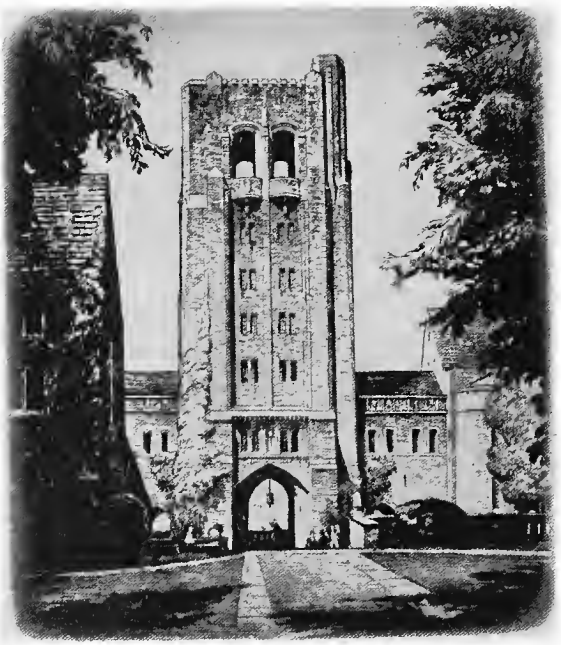

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A

PRACTICAL TREATISE

UPON

THE LAW OF RAILWAYS.

BY

ISAAC F. REDFIELD, LL.D.

CHIEF JUSTICE OF VERMONT.

SECOND EDITION.

BOSTON:
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PREFACE TO THE SECOND EDITION.

THE short time which has intervened, since the first publication of the work, has not afforded as much opportunity for thorough revision, as was anticipated at that time. But all has been done, which the time would allow.

All the decisions which have since appeared, both in England and America, and they are more numerous and important than could have been anticipated, in so short a period, have been carefully collated, and every point decided inserted in its appropriate place in the work. And where the subject was deemed of special interest, to the profession and the public, the leading views maintained, in some of the most thoroughly reasoned opinions, have been inserted. These extracts are chiefly confined to the subjects of railway investments, and the rights of attaching and levying creditors of railway companies; and while they do not add many pages, do add, it is believed, very considerably, to the value of the work.

The present edition is more complete and more correct, in some particulars, than the former one, and is not enlarged to an inconvenient size. It is commended, with renewed assurances of the most sincere gratitude for past favors, to the patronage of a profession proverbially liberalized by its learning, and made indulgent by its practical wisdom, and the extent and variety of its attainments.

WINDSOR, VT, May 26, 1858.

PREFACE.

THIS work was undertaken with the purpose of supplying, what seemed to the writer, a want, if not a necessity, to the profession in this country; a book upon the law of railways, which should present, within reasonable compass, and in a properly digested form, the whole law, upon the subject, both English and American. No treatise had attempted this. And the attempt has confirmed the expectation, that the accomplishment of such an undertaking, would be attended with labor and perplexity.

It seems desirable, that such a work should present every case, which has been decided, in both countries, in such a form, as to make the point of decision, plain and obvious, and at the same time, not convert a treatise into a mere digest. A mere treatise too, upon the principles, involved in the several departments of the law, brought under discussion in such a work, would be of little benefit, except to the student. This, too, will be found in the approved treatises, already published, upon these several subjects. On the other hand, a digest of the cases upon any plan, however comprehensive, or philosophical, might be the analysis, would appear an unsatisfactory labor, when we have already so much of the kind.

It is the endeavor of this undertaking to combine the two, in such a manner, as to render the work intelligible, and interesting, as an exposition of the principles involved; and at the same time present, a thorough analysis, and

digest, of all the important cases upon the subject, in such a manner, as to enable the reader, at once, to know the result of all the decisions, upon the several topics discussed.

The plan of the work is mainly new, and the effort has been, to render it natural, simple, and comprehensive. The manner of arranging the heads to the several subdivisions, has been adopted chiefly, with a view to enable the profession to find, at once, whatever the work contains, upon any topic, or question.

How far the design of the author has been accomplished, he submits to the indulgent judgment of his professional brethren, who have hitherto shown him so much forbearance. In justice to himself, perhaps it should be here mentioned, that the work has been prepared, under some disadvantages, from the constant pressure of official duties, which could not be required to accommodate themselves, in any respect, to the demands of this subordinate labor. It has thus happened, that although a considerable time has elapsed, since the work was seriously taken in hand, it has of necessity been done, to a great extent, at such intervals, more or less extensive, as circumstances would allow the writer to command, and always, in haste.

If some mistakes should be discovered, therefore, and some graver faults even, it is hoped that the profession will bear with them; with the assurance, that if the work should be found of sufficient importance, to require another edition, they will be corrected; and that if no such demand should be made, the work has probably received as much labor as it deserves.

WINDSOR, VT., November 20, 1857.

CONTENTS.

☞ The citations to other portions of the work are thus expressed, § — pl.— n.—. and the §§ are placed in the inner margin of the pages, for convenience of reference. The original paging is preserved in this edition.

CHAPTER I.

INTRODUCTION.

PAGE

1. Origin of railways in England 1
2. First built upon one's own land, or by special license from the owner 1, 2
3. Questions in regard to private railways 2
4. Railways in America, public grants 3
5. Use of steam-power on railways 4

CHAPTER II.

PUBLIC RAILWAYS.

PRELIMINARY ASSOCIATIONS.

[For this chapter, § 2–16, see Appendix A.]

CHAPTER III.

RAILWAYS ORDINARILY PRIVATE CORPORATIONS.

1. Private corporations where stock is private property 5
2. Public corporations where stock is owned, and the management retained, by the state 5
3. Public corporations have no rights beyond the control of legislative authority 6

CHAPTER IV.

PROCEEDINGS UNDER THE CHARTER.

SECTION I.

ORGANIZATION OF THE COMPANY.

1. Conditions precedent must be performed 7
2. Stock must all be subscribed, ordinarily 7
3. Charter, location of road, condition precedent 8
4. Colorable subscriptions binding at law 8
5. Conditions subsequent, how enforced 8
6. Stock distributed according to charter 8, 9
7. Commissioners must all act 9
8. Defect of organization must be plead 9
9. Question cannot be raised collaterally 9
10. Records of company, evidence 9

SECTION II.

ACCEPTANCE OF CHARTER, OR OF MODIFICATION OF IT.

1. New or altered charter must be formally accepted . . . 10

PAGE

2. Subscription for stock sometimes sufficient 10
3. Inoperative unless done as required 10
4. Assent to beneficial grant presumed 10
5. Matter of presumption and inference 10, 11
6. Organization or acceptance of charter may be shown by parol . 11

SECTION III.

ORDINARY POWERS—CONTROL OF MAJORITY.

1. Ordinary franchises of railways 11
3. Majority control, unless restrained 11
4. Cannot change organic law 12
5. Except in the prescribed mode 12
6. Cannot accept amended charter 12
7. Or dissolve corporation 12
8. May obtain enlarged powers 13
9. Courts of equity will not restrain the use of their funds for that purpose 13
10. But will, if to convert canal into railway 13
11. Right to interfere lost by acquiescence 13, 14
12. Acquiescence of one plaintiff, fatal 14
13. Railway a public trust 14
14. Suit maintained by rival interest 15

SECTION IV.

MEETINGS OF COMPANY.

1. Meetings, special and general 15, 16
2. Special, must be notified as required 16
3. Special and important matters, named in notice 16
4. Notice of general meetings need not name business 16
5. Adjourned meeting, still the same 16
6. Company acts by meetings, by directors, by agents 16
7. Courts presume meetings held at proper place 16, 17

SECTION V.

ELECTION OF DIRECTORS.

1. Should be at general meeting, or upon special notice 17
2. Shareholders may restrain their authority 17, 18
3. Company bound by act of directors, *de facto* 18
4. Act of officer *de facto* binds third persons 18

SECTION VI.

MEETINGS OF DIRECTORS.

1. All should be notified to attend 19
2. Adjourned meeting still the same 19
3. Board not required to be kept full 20
4. Usurpations tried by shareholders or courts 20
5. Usage often will excuse irregularities 20
6. Decisions of majority valid 20, 21
n. 8. Records of proceedings evidence 21

SECTION VII.

QUALIFICATION OF DIRECTORS.

1. One cannot be a contractor and director 22
2. May be their banker and director 22
3. May be director by virtue of stock mortgaged 22
4. Bankruptcy or absence will not vacate office 22
5. Company compelled to fill vacancies in board 22

CHAPTER V.

PREROGATIVE FRANCHISES.

PAGE

1. Control of internal communication, in a state, a prerogative franchise 23
2. Such a grant confers powers pertaining exclusively to sovereignty, as taking tolls, and the right of eminent domain 23

CHAPTER VI.

BY-LAWS AND STATUTES.

SECTION I.

POWER OF MAKING BY-LAWS, OR STATUTES.

1. May control conduct of passengers 24
2. Must be reasonable and not against law 24
3. Power may be implied, where not express 24, 25
4. Not required to be in any particular form unless by special provision . 25
6. Model code of by-laws framed by board of trade in England . 25, 26
7. Company may demand higher fare, if paid in cars . . . 26
8. Public statutes control by-laws 26, 27
9. Cannot impose penalty 27
10. Cannot refuse to be responsible for baggage 27

SECTION II.

BY-LAWS REGULATING THE USE OF STATIONS AND GROUNDS.

1. May exclude persons without business 27, 28
2. May regulate the conduct of others 28
3. Superintendent may expel for violation of rules . . . 28
4. Probable cause will justify 28
5. In civil-suit must prove violation of rules 28, 29

SECTION III.

BY-LAWS, AS TO PASSENGERS.

1. By-laws as statutes 30, 31
2. As mere rules, or regulations 31
3. Requiring larger fares, for shorter distances . . . 31, 32
4. Requiring passengers to go through in same train . . . 32
5. Arrest of passenger, by company's servants . . . 32, 33
7. Company liable for act of servant 33
8. By-law must be published 33, 34
9. Excluding merchandise from passenger trains 34
10. Discrimination between fares paid in cars, and at stations . 34, 35
11. Liability for excess of force 36

CHAPTER VII.

CAPITAL STOCK.

SECTION I.

LIMITATIONS.

1. General rights of shareholders 36
2. Capital stock not the limit of property 36
3. Cannot mortgage, unless on special license of the legislature . 36, 37

SECTION II.

CONDITIONS PRECEDENT, WHICH THE PUBLIC AUTHORITIES MAY ENFORCE.

1. Stock if limited, must all be subscribed 37
2. Payments at time of subscription 37, 38

SECTION III.

SHARES PERSONAL ESTATE.

PAGE

1. Railway shares personal estate at common law 38, 39
2. Not an interest growing out of land, or goods, wares, and merchandise 39
3. Early cases treated such shares as real estate 39, 40

CHAPTER VIII.

TRANSFER OF SHARES.

SECTION I.

RESTRICTIONS UPON TRANSFER.

1. Express provisions of charter to be observed 41–43
2. If not made exclusive, held directory merely 42–44
3. Unusual and inconvenient restrictions void 43, 44
4. But a lien upon stock for the indebtedness of the owner is valid . . 44
5. Such lien is not implied 44
6. Where transfer is wrongfully refused, vendee may recover value of the company 44

SECTION II.

CONTRACTS TO TRANSFER STOCK.

1. Transfer under English statutes. Registered companies . . 45
2. Contracts to transfer stock valid, where *bonâ fide* . . . 45
3. Vendor must have the stock, when due 45, 46
n. 3. Vendor must procure the consent of directors, where requisite . 45

SECTION III.

INTERVENING CALLS, OR ASSESSMENTS.

1. Vendor must pay calls, if that is requisite to pass title . . 46, 47
2. Generally it is matter of construction, and inference . . 47, 48
n. 2. Calls paid by vendor after executing transfer . . . 47, 48

SECTION IV.

TRANSFER BY DEED IN BLANK.

1 and 2. Blank transfer formerly held invalid in England . . . 48
3. Rule different in America 48

SECTION V.

SALE OF SPURIOUS SHARES.

1. Vendor, who acts *bonâ fide*, must refund money 49, 50
3. No implied warranty in such case, which will entitle the vendee to special damage 50
4. Rule of the stock exchange, made after the sale, not binding upon parties 50

SECTION VI.

READINESS TO PERFORM. CUSTOM AND USAGE.

1. Vendor must be ready and offer to convey 50
2. Vendee must be ready to pay price 51
3. General custom and local usage 51–53
4. The party taking the initiative, must prepare the writings . . 52, 53
n. 3. Oral evidence to explain memoranda of contract . . 51–53

SECTION VII.

DAMAGES. SPECIFIC PERFORMANCE.

PAGE

1. Damages, difference between contract price and price at time of delivery 54
2. Equity will decree specific performance of contract for sale of shares 54

SECTION VIII.

SPECIFIC PERFORMANCE.

1. Specific performance decreed against the vendee 54, 55
2. This was denied in the early cases 55
3. Owner of original shares may transfer them 55
4. Will not decree specific performance where not in the power of the party 55, 56

SECTION IX.

TRUSTEE ENTITLED TO INDEMNITY AGAINST FUTURE CALLS.

1. Trustee entitled to indemnity, on general principles . . 56
2. English courts hesitated, in regard to railway shares . . . 56
3 and 4. Cases reviewed 56, 57
5. Mortgagees liable, as stockholders, for the debts of the company 57–59

SECTION X.

FRAUDULENT PRACTICES TO RAISE THE PRICE OF SHARES.

1. Courts of equity will vacate sales so procured 60
2. Necessary parties 60, 61
3 and 4. Dividends declared, when none are earned, will vacate sales, and subject directors to indictment 61
5. Equity will not interfere where vendor acted *bonâ fide*, unless the shares were valueless 61
6. Managers of company liable in tort to party injured . . 61, 62

SECTION XI.

LIABILITY OF COMPANY FOR NOT REGISTERING TRANSFERS.

1. The company liable to action 62, 63
2. May be compelled to record transfers by mandamus 63
3. But not compellable to record mortgages of shares . . . 63

SECTION XII.

WHEN CALLS BECOME PERFECTED.

1. Calls are made when the sum is assessed, notice may be given afterwards 63, 64
2. Directors the proper authority to make calls 64

SECTION XIII.

TRANSFER BY DEATH, INSOLVENCY, OR MARRIAGE.

1. Mandamus lies to compel the registry of successor . . . 64, 65
3. In case of death, personal representative liable to calls . . . 65
4. Notice requisite to perfect the title of mortgagee . . . 65
5. Stock in trust goes to new trustees 65
6. Assignees of insolvents not liable for the debts of the company . 65, 66

SECTION XIV.

LEGATEES OF SHARES.

1. Entitled to election, interest, and new shares 66

2. Shares owned at date of will pass, although converted into consolidated stock . . . . . PAGE 66
3. Consolidated stock subsequently acquired will not pass . . . 66

SECTION XV.

SHARES IN TRUST.

1 and 2. Company may safely deal with registered owner . . 66, 67
3. But equity will protect the rights of *cestuis que trust* . . . 67

CHAPTER IX.

ASSESSMENTS OR CALLS.

SECTION I.

PARTY LIABLE FOR CALLS.

1. The party upon the registry liable for calls 68
2. Bankrupts remain liable for calls 68
3. *Cestuis que trust* not liable for calls, in law or equity . . 69

SECTION II.

COLORABLE SUBSCRIPTIONS.

1. Colorable subscriptions valid 69
2. Directors may be compelled to register them . . . 69, 70
3. Oral evidence to vary the written subscription inadmissible . . 70

SECTION III.

MODE OF ENFORCING PAYMENT.

1. Subscription to indefinite stock, raises no implied promise to pay the amount assessed 70, 71
2. If shares are definite, subscription implies a promise to pay assessments. Right of forfeiture a cumulative remedy . . . 71–73
3. Whether issuing new stock will bar a suit against subscriber, *quære* 73, 74
4. It would seem not 74
5. But the requirements of the charter and general laws of the state, must be strictly pursued, in declaring forfeiture of stock . . . 74

SECTION IV.

CREDITORS MAY COMPEL PAYMENT OF SUBSCRIPTIONS.

1. Company compelled, to collect of subscribers, by mandamus . 75
2, 3, and 4. Amount due from subscribers, a trust fund for the benefit of creditors 75
5. If a state own the stock it will be the same 75
6 and 7. A diversion of the funds from creditors is a violation of contract on the part of the company, and a state law authorizing it invalid 75, 76
8 and 9. The general doctrine above stated found in many American cases 76
10. Judgment creditors may bring bill in equity 77
11. Promoters of railways liable, as partners, for expenses of procuring charter 77

SECTION V.

CONDITIONS PRECEDENT TO MAKING CALLS.

1. Conditions precedent must be performed before calls . . 77, 78
2. But collateral, or subsequent conditions not 78
3. Definite capital must all be subscribed before calls . . . 79
4. It is the same where defined by the company, as in the charter . 79

PAGE
5. Conditional subscriptions not to be reckoned 80
6. Legislature cannot repeal conditions precedent 80

SECTION VI.

CALLS MAY BE MADE PAYABLE BY INSTALMENTS. 81

SECTION VII.

PARTY LIABLE FOR CALLS.

1. Subscribers liable to calls 81
2 and 6. What constitutes subscription to a capital stock . . 81–83
3. How a purchaser of stock becomes liable to the company . . 82
4. One may so conduct as to estop him from denying his liability . 82, 83
5. The register of the company evidence of membership . . . 83

SECTION VIII.

RELEASE FROM LIABILITY FOR CALLS.

1 and 2. Where the transfer of shares, without registry, will relieve the proprietor from calls 84
3. Where shares are forfeited by express condition, subscriber no longer liable for calls 85

SECTION IX.

DEFENCES TO ACTIONS FOR CALLS.

1. Informality in organization of company insufficient . . . 85, 86
2. Slight acquiescence stops the party in some cases 86
3 and 4. Default in first payment insufficient 86, 87
5. Company and subscriber may waive that condition . . 87, 88, 89
6. Contract for stock, to be paid, in other stock 89
7 and 8. Infancy. Statute of limitations and bankruptcy . . 89, 90

SECTION X.

FUNDAMENTAL ALTERATION OF CHARTER.

1. Will release the subscribers to stock 91
2. Railway company cannot purchase steamboats . . . 91, 92
3. 7. Majority may bind company to alterations, not fundamental . 92, 94
4. Directors cannot use the funds for purposes foreign to the organization 94
5. 9. But where the legislature or the directors, make legal alterations in the charter, or the location of the road, it will not release subscribers 94, 95, 96
6. But if subscriptions are made upon condition of a particular location, it must be complied with 95
8. 9. Consideration of subscription, being location of road, must be substantially performed. Express conditions must be performed 95, 96

SECTION XI.

SUBSCRIPTIONS BEFORE DATE OF CHARTER.

1. Subscriptions before date of charter good 97
2. Subscriptions upon condition not performed . . . 97, 98, 99
n. 4. Where the condition is performed 97, 98, 99

SECTION XII.

SUBSCRIPTION UPON SPECIAL TERMS.

1. Subscriptions not payable in money 99
2. Subscriptions at a discount, not binding 99, 100
n. 2. Contracts, to release subscriptions, not binding . . 99, 100

SECTION XIII.

EQUITABLE RELIEF FROM SUBSCRIPTIONS OBTAINED BY FRAUD.

PAGE

1. Substantial misrepresentations in obtaining subscriptions will avoid them 100, 101
2. But for circumstantial misconduct of the directors, in the matter, they alone are liable 101
3. Directors cannot make profit for themselves 101

SECTION XIV.

FORFEITURE OF SHARES. RELIEF IN EQUITY.

1. Requirements of charter and statutes must be strictly pursued . 102
2. If not, equity will set aside the forfeiture 102
3. Must credit the stock, at full market value 102
4. Provisions of English statutes 102, 103
5. Evidence must be express, that all requisite steps were pursued . . 103

CHAPTER X.

RIGHT OF WAY BY GRANT.

SECTION I.

OBTAINING LANDS BY EXPRESS CONSENT.

1. Leave granted by English statute 104
2. Persons under disability 104, 105
3. n. 2. Money to take the place of the land 105
4. Consent to pass railway 105
5. Duty of railway in all cases 105
6. License to build railway. Extent of duration 105
7. Company bound by conditions in deed 106
8. Parol license good till revoked 106
9. Sale of road no abandonment 106
10. Deed conveys incidents; not explainable 106, 107

SECTION II.

SPECIFIC PERFORMANCE IN EQUITY.

1. Contracts before and after date of charter 107
2. Contracts where all the terms not defined 107
3. Contracts for land, umpire to fix price 107, 108
4. Where mandamus also lies 108
5. Contracts not signed by company 108
6. Where terms are uncertain 108
7. Contracts giving the company an option 108, 109
8. Contracts not understood by both parties 109
9. Order in regard to construction of highways, may be enforced at the suit of the municipality 109, 110

CHAPTER XI.

EMINENT DOMAIN.

SECTION I.

GENERAL PRINCIPLES.

1. Definition of the right 111
2. Intercommunication 111, 112
3. Necessary attribute of sovereignty 112
4. Antiquity of its recognition 112

PAGE
5. Limitations upon its exercise 112, 113
6. Resides principally in the states 113
7. Duty of making compensation 113
8. Navigable waters 113
9, 10, and 11. Its exercise in rivers, above tide water . . 113, 114

SECTION II.

TAKING LANDS IN INVITUM.

1. Legislative grant requisite 114, 115
2. Compensation must be made 115
3. Consequential damages 115
4. Extent of such liability 115
5. These grants strictly construed 115
6. Limitation of the power to take lands 116
7. Interference of courts of equity 116
8. Rule of construction in American courts . . . 116, 117
9. Strict, but reasonable, construction 117
10. Rights acquired by company 117
11. Limited by the grant 117

SECTION III.

CONDITIONS PRECEDENT.

1. Conditions precedent must be complied with 118
2. That must be alleged in petition 118
3. When title vests in company 118, 119

SECTION IV.

PRELIMINARY SURVEYS.

1. May be made without compensation 119
2. Company not trespasser 120
3. For what purposes company may enter upon lands . . 120
4. Company liable for materials. 120, 121
5. Right to take materials 121
6. Location of survey 121

SECTION V.

POWER TO TAKE TEMPORARY POSSESSION OF PUBLIC AND PRIVATE WAYS 121

SECTION VI.

LAND FOR ORDINARY AND EXTRAORDINARY USES.

1. By English statute may take land for all necessary uses . . 122
2. Companies have the same power here 122, 123
3. So also of companies connecting at state lines . . . 123

SECTION VII.

TITLE ACQUIRED BY COMPANY.

1. Company have only right of way 124
2. Can take nothing from soil except for construction . . 124
3. Deed in fee-simple to company 124, 125
4. For what uses may take land 125
5. Right to cross railway, extent of 125
6. Conflicting rights in different companies 125, 126
7. 8. Rule in the American states 126
9. Right to use streets of a city 126, 127
10. Law not the same in all the states 127
11. Rule in Massachusetts 127

PAGE

12. 13. Land reverts to the owner 127, 128
14. True rule stated 128
15. Conditions must be performed 128
16. Further assurance of title 128
17. Condemnation cannot be impeached 129

SECTION VIII.

CORPORATE FRANCHISES CONDEMNED.

1. Road franchise may be taken 129
2. Compensation must be made 129, 130
3. Railway franchise may be taken 130
4. Rule defined 130
5. Constitutional restrictions 130, 131
6. Not well defined 131
7. Must be exclusive, in terms 131
8. Legislative discretion 131
9. Highways and railways compared 131, 132
10. Extent of eminent domain 132
11. Exclusiveness of the grant, a subordinate franchise . . . 132
12. Legislature cannot create a franchise, above the reach of eminent domain 132, 133

SECTION IX.

COMPENSATION. MODE OF ESTIMATING.

1. General inquiry simple 133, 134, 135
2. Remote damage and benefits not to be considered . . . 135
3. General rule of estimating compensation 135, 136
4. Prospective damages assessed 136
5. In some states value, "in money," is required . . . 136
6. 7. Damage and benefits cannot be considered in such cases . 136, 137
8. Rule of the English statute 137, 138
9. Farm accommodations 138
10. Benefits and damage, if required, must be stated . . . 138, 139
n. 10. Course of the trial, in estimating land damages . . 138, 139

SECTION X.

MODE OF PROCEDURE.

1. Legislature may prescribe 139, 140
2. Must be upon proper notice 140
3. Formal exceptions waived, by appearance . . . 140
4. Unless exception is upon record 140
5. Proper parties, those in interest 140, 141
6. Title may be examined 141
7. Plaintiffs must show joint interest 141
8. Jury may find facts and refer title to the court . . . 141
9. Land must be described in verdict 141, 142
10. Distinct finding on each claim 142
11. Different interests 142
12. What evidence competent 142
13. Proof of value of land 142, 143
14. Opinion of witnesses 143
15. Testimony of experts 143
16. Matters incapable of description 143, 144
17. Costs 144, 145
18. Expenses 145
19. Commissioners' fees 145
20. Appellant failing must pay costs 145
21. Competency of jurors 145

PAGE
22. Power of court to revise proceedings 145
23. Debt will not lie on conditional report 145
24. Excessive damages, ground of setting aside verdict . . . 146
n. Other matters of practice 146, 147

SECTION XI.

WHEN COMPENSATION MUST BE MADE.

1. Opinions conflicting 147
2. Chancellor Kent's definition 147, 148
3. That of the Code Napoleon 148
4. Most state constitutions require it to be concurrent with the taking 148, 149
5. English cases do not require this 149, 150
6. Adequate legal remedy sufficient 150
7. Where required, payment is requisite to vest the title . . 150, 151
8. Some states hold that no compensation is requisite . . . 151

SECTION XII.

APPRAISAL INCLUDES CONSEQUENTIAL DAMAGES.

1. Consequential damage barred 152
2. Such as damage, by blasting rock 152, 153
3. But not where other land is used unnecessarily 153, 154
4. But loss by fires, obstruction of access, and cutting off springs is barred 154
5. Loss by flowing land, not barred 154
6. Damages, from not building upon the plan contemplated, are barred 154, 155
7. Special statutory remedies reach such damages 155
8. Exposure of land to fires 155

SECTION XIII.

ACTION FOR CONSEQUENTIAL DAMAGES.

1. Statute remedy for lands "injuriously affected" 155, 156
2. Without statute not liable to action 156, 157
3. Are liable for negligence in construction, or use 157
4. Statute remedy exclusive 157
5. Minerals reserved 157, 158

SECTION XIV.

RIGHT TO OCCUPY HIGHWAY.

1. Decisions conflicting 158
2. First, held that owners of the fee were entitled to additional damages 158–160
3. Principle seems to require this 159, 160
4. Many cases take a different view 161
5. Legislatures may and should require such additional compensation 161, 162
6. Courts of equity will not enjoin railways from occupying streets of a city 162
7. Some of the states require such compensation 162, 163
n. 9. All do not. But the English courts, principle, and many of the state courts, do require it, as matter of right . . . 163, 164

SECTION XV.

CONFLICTING RIGHTS IN DIFFERENT COMPANIES.

1. Railway company subservient to another, can only take of the other, land enough for its track 164, 165
2. Where no apparent conflict, in route, first located, acquires superior right 165

SECTION XVI.

RIGHT TO BUILD OVER NAVIGABLE WATERS.

PAGE

1. Legislature may grant the right 165, 166
2. Riparian proprietor owns only to the water 166
3. His rights in the water subservient to public use 166, 167
4. Legislative grant paramount, except the national rights . . . 167
5. State interest in flats where tide ebbs and flows 167
6. Rights of adjoining owners in Massachusetts 167, 168
7. Railway grant to place of shipping 168
8. Principal grant carries its incidents 168
9. Grant of a harbor includes necessary erections 168
10. 11. Large rivers held navigable in this country . . . 168, 169
12. Land being cut off from wharves is "injuriously affected" . . 169
13. Paramount rights of Congress infringed creates a nuisance. Party specially injured may have action 169, 170

SECTION XVII.

OBSTRUCTION OF STREAMS BY COMPANY'S WORKS.

1. Cannot divert stream, without compensation 170
2. Company liable for defective construction 170
3. So also if they use defective works, built by others . . . 170, 171
4. Company liable to action, where mandamus will not lie . . . 171
5. Company liable for defective works, done according to their plans . 171
6. When a railway "cuts off" wharves from the navigation . . . 171, 172

SECTION XVIII.

OBSTRUCTION OF PRIVATE WAYS.

1. Obstruction of private way matter of fact, need not be illegal . . 172
2. Farm road, on one's own land, not private way 172
3. But railway may lawfully pass along public street . . . 172, 173

SECTION XIX.

STATUTE REMEDY EXCLUSIVE.

1. Remedy for land taken, exclusively under the statute . . . 173, 174
2. But if company do not pursue statute are liable as trespassers. Liable for negligence also 174
3. Courts of equity often interfere by injunction . . . 174, 175

SECTION XX.

LANDS INJURIOUSLY AFFECTED.

1. Obstruction of way, loss of custom 175
2. Equity will not enjoin legal right 176
3. Liable for building railway, so as to cut off wharf 176
4. Not liable for crossing highway on level 176
5. English statute only includes damages by construction . . . 176, 177
6. Equity will not enjoin even a doubtful claim 177
7. Damages unforeseen, at the time of the appraisal, may be recovered, in England 177, 178
8. Injuries to ferry, and towing-path compensated 178
9. 10. Remote injuries not within the statute 178
11. Damages compensated, under statute of Massachusetts . . . 178, 179
12. Damages not compensated as being too remote 179
13. For negligence in construction, remedy at common law . . . 179

SECTION XXI.

DIFFERENT ESTATES PROTECTED.

1. Tenant's good-will, and chance of renewal protected . . . 180
2. Tenants entitled to compensation for change of location . . 180, 181
3. Church property in England, how estimated . . . 181
4. Tenant not entitled to sue, as owner of private way . . 181
5. Heir should sue for compensation 181
6. Lessor and lessee both entitled to compensation . . . 181
7. Right of way, from necessity, protected . . 181, 182
8. Mill-owner entitled to action for obstructing water . . 182
9. Occupier of land entitled to compensation 182
10. Tenant, without power of alienation, forfeits his estate, by license to company 182

SECTION XXII.

ARBITRATION.

1. Attorney, without express power, may refer disputed claim . 182, 183
2. Award binding, unless objected to in court 183

SECTION XXIII.

STATUTE OF LIMITATIONS.

1. General limitation of actions, applies to land claim . . . 183
2. Filing petition will not save bar 183, 184

CHAPTER XII.

REMEDIES BY LAND-OWNERS UNDER THE ENGLISH STATUTE.

CHAPTER XIII.

ENTRY UPON LAND, BEFORE COMPENSATION IS ASSESSED, UNDER THE ENGLISH STATUTE.

CHAPTER XIV.

THE MODE OF ESTIMATING COMPENSATION UNDER THE ENGLISH STATUTE.

[For these three chapters, § 86–104, which contain the proceedings under the English statute, with the decisions in regard to them, and occasional references to the decisions of the American courts, upon analogous provisions, see Appendix B.]

CHAPTER XV.

CONSTRUCTION OF RAILWAYS.

SECTION I.

LINE OF RAILWAY. RIGHT OF DEVIATION.

1. Manner of defining the route in English charters . . . 186–189
2. Question involved stated 187–189
3. Plans only binding, when and for the purpose referred to, in the act 189
4. Contractor bound by deviation, unless he object . . 189, 190
5. Courts of equity will not enforce contract against public security . 190
6. Right to construct accessory works 190, 191
7. 8. Company may take lands designated, in their discretion . 191
9. Equity cannot enforce contract, not incorporated into the act . . 191
10. Right of deviation lost by election 191, 192
11. Railway between two towns, extent of grant . . . 192
12. Grant of land for railway, includes accessories . . . 192, 193

PAGE

13. Route designated need not be followed literally . . . 193
14. Terminus being a town, is not extended, as the town extends . 193

SECTION II.

DISTANCE, HOW MEASURED.

1. This is affected by subject-matter 193, 194
2. Contracts to build railway, by rate per mile 194
3. General rule to measure by straight line 194
4. Same rule in regard to turnpike roads 194

SECTION III.

MODE OF CONSTRUCTION, TO BE DONE WITH LEAST DAMAGE.

1. Does not extend to form of the road, but the mode of construction . 195
2. Special provisions of act not controlled by this general one . 195
3. Works interfered with, to be restored, for all uses . . . 195

SECTION IV.

MODE OF CROSSING HIGHWAYS.

1. English statutes require it should not be at grade . . . 196
2. Or if so, that gates should be erected and tended . . . 196
3. And if near a station, railway train not to exceed four miles an hour 196
4. Cannot alter course of highway 196, 197
5. Mandamus does not lie where company have an election . . 197

SECTION V.

RIGHTS OF TELEGRAPH COMPANIES.

1. Right to "pass directly across a railway," does not justify boring under it 197, 198
2. Exposition of the terms "under" and "across" . . . 198

SECTION VI.

DUTY IN REGARD TO SUBSTITUTED WORKS.

1. Bound to repair bridge, substituted for ford, or to carry highway over railway 198
2. The same rule has been applied to drains, substituted for others . 198

SECTION VII.

CONSTRUCTION OF CHARTER IN REGARD TO NATURE OF WORKS, AND MODE OF CONSTRUCTION 199

SECTION VIII.

TERMS OF CONTRACT. MONEY PENALTIES. EXCUSE FOR NON-PERFORMANCE.

1. Contracts for construction assume unusual forms . . 199, 200
2. Estimates made by engineer 200
3. Money penalties, liquidated damages. Full performance . 200, 201
4. Excuses for non-performance 201
5. Penalty not incurred, unless upon strictest construction . 201, 202
6. 7. Contractor not entitled to any thing, for part performance . 203
8. Contract for additional compensation must be strictly performed . 203
n. 2. Proper construction of the terms used in these contracts . 200, 201

SECTION IX.

FORM OF EXECUTION. EXTRA WORK. DEVIATIONS.

1. No particular form of contract requisite generally . . 202, 203

PAGE
2. But the express requirements of the charter must be complied with 203, 204
3. Extra work cannot be recovered of the company, unless done upon the terms specified in contract 204
4. If the company have the benefit of work, are liable . . 204

SECTION X.

IF ONE PARTY REPUDIATE THE CONTRACT, THE OTHER MAY SUE PRESENTLY.

1. Party repudiating excuses the other 205
2. New contract valid 205
3. President cannot bind the company 205

SECTION XI.

DECISIONS OF REFEREES AND ARBITRATORS IN REGARD TO CONSTRUCTION CONTRACTS.

1. Award valid if substantially correct 206
2. Court will not set aside award, where it does substantial justice 206, 207

SECTION XII.

DECISIONS OF COMPANY'S ENGINEERS.

1. Estimates for advances, mere approximations, under English practice . 207
2. But where the engineer's estimates are final, can only be set aside, for partiality or mistake 207, 208
3. Contractor bound by practical construction of the contract . . 208
4. Estimates do not conclude matters, not referred . . . 208
5. If contractor consent to accept pay in depreciated orders, he is bound by it 208, 209
6. Right of appeal lost by acquiescence 209
7. Engineer cannot delegate his authority 209
8. Arbitrator must notify parties, and act *bonâ fide* . . . 209

SECTION XIII.

RELIEF IN EQUITY FROM DECISIONS OF COMPANY'S ENGINEERS.

1. Facts of an important case stated 209–215
2. Claim of contractor in the bill 215
3. Bill sustained. Amendment alleging mistake in estimates . 215, 216
4. Relief only to be had in equity 216
5. Proof of fraud must be very clear 216
6. Engineer being shareholder, not valid objection . . . 216
7. Decision of engineer conclusive as to quality of work, but not as to quantity 216
8. New contract condonation of old claims 216
9. Account ordered after company had completed work . . . 216
10. Money penalties cannot be relieved against unless for fraud . 216
n. 1. Review of the cases upon this subject . . . 210–215

SECTION XIV.

FRAUD IN CONTRACTS FOR CONSTRUCTION.

1. Relievable in equity upon general principles . . . 217
2. Statement of leading cases upon this subject . . . 217–221
3. Where no definite contract closed, no relief can be granted . 221

SECTION XV.

ENGINEER'S ESTIMATE WANTING THROUGH FAULT OF COMPANY.

1. In such case contractor may maintain bill in equity . . 221, 222

PAGE

2. Grounds of equitable interference 222
3. After company terminate contract, contractor will be enjoined from interference 222, 223
4. Stipulation requiring engineer's estimate, not void 223
5. Not the same, as an agreement, that all disputes shall be decided by arbitration 223
6. Engineer's estimate proper condition precedent 223
7. Same as sale of goods, at the valuation of third party . . 223, 224
8. The result of all the English cases seems to be, that only the question of damages is properly referable to the engineer . . . 224
9. The rule in this respect different, in this country . . . 224, 225

SECTION XVI.

CONTRACTS FOR MATERIALS AND MACHINERY.

1. Manufacturer not liable for latent defect in materials . . 225
2. Contract for railway sleepers, terms stated 225, 226
3. Construction of such contract 226
4. Party may waive stipulation in contract, by acquiescence . . 226
5. Company liable for materials, accepted and used . . . 227

SECTION XVII.

CONTRACTS TO PAY IN THE STOCK OF THE COMPANY.

1. Breach of such contract generally entitles the party to recover the nominal value of stock 227
2. But if the party have not strictly performed on his part, can only recover market value 227, 228, 229
3. Cash portion overpaid, will only reduce stock portion, dollar for dollar 229
n. 2. Lawful incumbrance on company's property, will not excuse contractor from accepting stock 228, 229

SECTION XVIII.

TIME AND MODE OF PAYMENT.

1. No time specified, payment due only, when work completed . . 230
2. Stock payments must ordinarily be demanded 230
3. But if company pay monthly, such usage qualifies contract . . 230
4. Contract to build wall, by cubic yard, implies measurement, in the wall 230

SECTION XIX.

REMEDY ON CONTRACTS FOR RAILWAY CONSTRUCTION.

1. Recovery on general counts 231
2. Amount and proof governed by contract 231

SECTION XX.

MECHANIC'S LIEN.

1. Such lien cannot exist in regard to a railway 231
2. Opinion of Scott, J. 231

CHAPTER XVI.

COMMON CARRIERS.

SECTION I.

DUTY AT COMMON LAW.

1. Inevitable accident 232, 233
2. To excuse carrier, force must be above human control, or that of public enemy 233

PAGE
3. Are insurers against fire, except by lightning 233
4. Instances of perils which excuse carrier 233, 234
5. If carrier expose himself to perils, he must bear the loss, but not of delay from unknown peril 234
6. Is liable for loss in price, during delay, caused by his fault . . . 234

SECTION II.

RAILWAY COMPANIES COMMON CARRIERS.

1. Common carriers, those who carry for all who apply . . . 234, 235
2. Under the English statute entitled to notice of claim . . . 235
3. Railways liable, as common carriers of passengers' baggage, and of freight 235, 236

SECTION III.

LIABILITY FOR PARCELS CARRIED BY EXPRESS.

1. Carriers, who allow servants to carry parcels, are liable for loss 236–238
2. Importance of making railways liable for acts of agents . . 238
3. Allowing perquisites to go to agents will not excuse company . 238
4. Owner of parcels, carried by express, may look to company . 238, 239
5. May sue subsequent carrier, who is in fault 239
6. European railway companies are express carriers 239

SECTION IV.

RIGHTS AND DUTIES OF EXPRESS CARRIERS.

1. Liable for not making delivery to consignee . . . 239, 240
2. Contract of company with local carriers only temporary . . 241
3. Cannot charge in proportion to value of parcels, and restrict their liability 241
4. Not responsible beyond their routes 241
5. Company, where statute prohibits discrimination, cannot charge express carriers higher than others, or give one such carrier exclusive privileges 241, 242

SECTION V.

RESPONSIBILITY FOR BAGGAGE OF PASSENGERS.

1. Liable as common carriers for baggage 242
2. Liability where different companies form one line . . 242, 243
3. Company liable for actual delivery to the owner . . . 243
4. Company not liable unless baggage given in charge to their servants 243, 244, 245
5. Liability results from duty, and not from contract . . . 245

SECTION VI.

WHEN THE CARRIER'S RESPONSIBILITY BEGINS.

1. Begins, in general terms, upon delivery of the goods . . . 246
2. Delivery at the usual place of receiving goods, with notice, sufficient 246
3. Where goods are delivered to be carried, carrier liable from delivery 246, 247
4. But not responsible till they receive the goods, on a continuous line 247
5. Acceptance by agent sufficient, without payment of freight . 247
6. Question of fact, whether carrier took charge of the goods . 247, 248
7. Sufficient to charge company, that goods are put in charge of their servants 248
8. Whether goods are left for immediate transportation, matter of inference often 248, 249

SECTION VII.

TERMINATION OF CARRIER'S RESPONSIBILITY.

PAGE

1. Responsibility of carrier of parcels for delivery 249
2. Company not bound to make delivery of ordinary freight 249, 250, 251
3. The duty, as to delivery, affected by facts, and course of business . 251
4. Railway company not bound to deliver goods, or give notice of arrival 251, 252
5. Rule, in regard to delivery, in carriage by water . . 252
6. Only bound to keep goods reasonable time after arrival . 252, 253
7. Consignee must have reasonable opportunity to remove goods 253, 254
8. After this, carrier only liable for ordinary neglect . . 254, 255
9. If goods arrive out of time, consignee may remove, after knowlege of arrival 255–258
10. So if company's agent misinform the consignee 259
11. Carrier excused, when consignee assumes control of goods . 259
12. Effect of warehousing, at intermediate points, in route . 259, 260
13. If carrier has place of receiving goods, responsibility attaches on delivery there 260
14. Warehousemen, who are carriers, held responsible as carriers, on receipt of goods generally 260

SECTION VIII.

GENERAL DUTY OF CARRIERS. EQUALITY OF CHARGES. SPECIAL DAMAGE.

1. Bound to carry for all who apply 261
2. May demand freight in advance. Refusal to carry excuses tender 261, 262
3. Payment of freight, and fare, will be presumed, sometimes . . 262
4. What will excuse carrier, from carrying, or delivery . . 262–265

SECTION IX.

NOTICE RESTRICTING CARRIER'S RESPONSIBILITY.

1. Special contract, limiting responsibility, valid . . . 264, 265
2. Notice, assented to by consignor, has same effect . . . 265
3. But as matter of evidence, it is received with caution . . 265, 266
4. Carrier must show that consignor acquiesced in notice . . 266
5. Decided cases. Carriers' Act 266, 267
6. New York courts held, at one time, that express contract will not excuse the carrier 267, 268
7. American cases generally hold notice, assented to, binding . . 268
8. But in New Hampshire, knowledge of such notice is not sufficient to bind the owner 269
9. Will not exouse for negligence 269
10. Cases in Pennsylvania 269
11. General result of all the cases 269

SECTION X.

NOTICE, OR EXPRESS CONTRACT, LIMITING CARRIERS' LIABILITY.

1. Written notice will not affect one, who cannot read . . 270
2. Carrier must see to it, that his notice is made effectual . . 270
3. Must be shown that knowledge of notice came to consignor . 270, 271
4. But former dealings with same party may be presumptive evidence 271, 272
5. Carrier cannot stipulate for exemption from liability for negligence . 272
6. But carrier may be allowed to stipulate for exemption from responsibility as an insurer 272
7, 8, 9, 10, 11, and 12. Review of the cases favoring this proposition 272–276
13 and 14, and n. 17. Review of English cases bearing in opposite direction 276–280

SECTION XI.

NOTICES AS TO ORDINARY AND EXTRAORDINARY RESPONSIBILITY OF CARRIERS.

PAGE
1. American writers and cases adopt this distinction . . . 280, 281
2. The English cases do not seem to recognize it . . . 281

SECTION XII.

RESPONSIBILITY FOR CARRIAGE BEYOND COMPANY'S ROAD.

1. English rule to hold first company liable to the end of the route . 281, 282
2. This rule not followed in the American courts . . 282–284
3. But company may undertake for whole route . . . 283, 284
4. This is presumed when they are connected in business . 284–286
5. Case of refusal to pay charges demanded, and return of goods before reasonable time 286, 287

SECTION XIII.

POWER OF COMPANY TO CONTRACT TO CARRY BEYOND ITS OWN LIMITS.

1. No doubt existed in regard to this power until very recently . 287, 288
2. Receiving freight across other lines, and giving ticket through . 288
3, 4, and 5. Cases reviewed upon this point . . . 288–290

SECTION XIV.

AUTHORITY OF THE AGENTS AND SERVANTS OF THE COMPANY.

1. Board of directors have same power as company, unless restricted 290, 291
2. Other agents and servants cannot bind the company beyond their sphere 291
3. Owner may countermand destination of goods, through proper agent . 291
4. But an agent who assumes to bind the company beyond his sphere, cannot 291, 292
5. Ratification of former similar contracts, evidence against company . 292
6. Notice by company of want of authority in servants, if known, will excuse them 292
7. Illustrations of the rule 292, 293
8. Servant may bind company, even when he disobeys their directions 293
9. Company responsible for the servants of other companies . . 293

SECTION XV.

LIMITATION OF DUTY BY COURSE OF BUSINESS.

1. Carriers bound only to the extent of their usage, and course of business 293, 294
2. This question arises only, when they refuse to carry . . 294, 295
3. Carriers and some others are bound to serve all who apply . . 295
4. Duty under English Carriers' Act 295

SECTION XVI.

STRANGERS BOUND BY COURSE OF BUSINESS AND USAGES OF TRADE.

1. Those who employ railway companies, bound to know the manner of transacting their business 295, 296, 297
2. General usages of trade presumed to be familiar to all . . 269
3. Contracts for transportation contain, by implication, known usages of the business 296, 297

SECTION XVII.

CASES WHERE THE CARRIER IS NOT LIABLE FOR GROSS NEGLIGENCE.

1. Extent of English Carriers' Act 297, 298
2. Must give specification, and pay insurance 299

PAGE

3. Loss by felony of servants excepted. But not liable unless by carrier's fault 299
4. Not liable in such case, where the consignor uses disguise in packing 299
5. Carrier is entitled to have an explicit declaration of contents . 299, 300
6. But refusal to declare contents will not excuse the carrier for refusal to carry 300
7. This statute does not excuse carrier for delay in the delivery . 300–302

SECTION XVIII.

INTERNAL DECAY. BAD PACKAGE. STOPPAGE IN TRANSITU. CLAIM BY SUPERIOR RIGHT.

1. Internal decay. Defective package 301–303
2. Right to stop *in transitu* 303, 304
3. Carrier liable, if he do not surrender the goods, to one having right to stop *in transitu* 304
4. Carrier may detain until right is determined 304, 305
5. Right exists, as long as the goods are under control of carrier . 304, 305
6. Most uncertainty exists, in regard to capacity of intermediate consignees 305
7. As long as goods are in the hands of mere carriers, right exists, but not when they reach the hands of the consignee's agent for another purpose 305, 306
8. Company compellable to solve question of claimant's right, at their peril 306
9. Conflicting claims of this kind may be determined, by replevin, or interpleader 306, 307
10. Or the carrier may deliver the goods to rightful claimant, and defend against bailor 307

SECTION XIX.

EFFECT OF BILL OF LADING UPON CARRIER.

1. Between consignor and carrier the bill of lading is *primâ facie* evidence 307, 308
2. But questions of quantity and quality of goods cannot be raised where intermediate carriers are concerned 308
3. Bill of lading may be explained by oral evidence 308, 309
4. Express promise to deliver goods, in good order, by a day named . 309
5. Effect of stipulation for deduction from freight, in case of delay . 309
6. If carrier demand full freight, in such case he is liable to refund . 309
7. Must be forwarded according to bill of lading 309

SECTION XX.

TO WHAT EXTENT THE PARTY MAY BE A WITNESS.

1. At common law the party could not be a witness in such cases . 310
2. Some of the American courts have received this testimony from necessity 310, 311
3, 4, 5. Decisions in different states 311
6. Agents and servants of the company admitted to testify, from necessity 311
7. Where the party's oath is not received, the jury are allowed to go upon reasonable presumption 311, 312

SECTION XXI.

EXTENT OF RESPONSIBILITY FOR BAGGAGE.

1 and 5. Not liable for merchandise, which passenger carries covertly 312, 313
2. And it makes no difference, that the passenger has no other trunk 312

3. Jewelry, being female attire, and a watch in a trunk, proper baggage . . . . . PAGE 312, 313
4 and n. 6. So also are, money for expenses, books for reading, clothing, spectacles, tools of trade, and many other similar things . . 313

SECTION XXII.

CARRIER'S LIEN FOR FREIGHT.

1. Lien exists, but damage to goods must be deducted, and freight must be earned 314, 315
2. But if freight be paid through, to first carrier, lien does not attach, ordinarily 315
3. A wrongdoer cannot create a valid lien against the real owner . 315
4, 5, 6, 7, 8. Illustration of the point last stated 315, 316
9. Passenger carrier has lien upon baggage for fare 317
10. Carriers have no lien for general balance of account 317
11. Lien may be waived, in same modes, as other liens . . 317
12. Delivery obtained by fraud, goods will be restored by replevin . 317
13. Last carrier in the route may detain goods, till whole freight paid 317
14. Carrier cannot sell goods in satisfaction of lien 317
15. Owner may pay freight, and sue for goods lost 317
16. Carrier is bound to keep goods reasonable time if refused by consignee 317

SECTION XXIII.

TIME OF DELIVERY.

1. Carrier must deliver goods in a reasonable time, or according to his contract 318
2. Delay caused, by unusual press of business, will not make carrier liable 318, 319
3. Or by the loss of a bridge, from an unusual freshet 319
4. Carriers excused by the custom and course of the navigation . 319

SECTION XXIV.

CARRIERS HAVE AN INSURABLE INTEREST IN THE GOODS . 319

SECTION XXV.

RULE OF DAMAGES, AND OTHER INCIDENTS OF ACTIONS AGAINST CARRIERS.

1. Damages for total loss are the value of the goods at the place of destination 320
2. Goods only damaged, owner bound to receive them, and the amount of damage 320, 321
3. Upon evidence of servant's unfaithfulness or negligence, some explanation must be given, or the company held liable . . . 321
4. Company liable, for special damages, where they act *mala fide* . 321, 322
5. But not ordinary liable for special damage 322
6. Consignor owning the goods the proper party to sue . . 322
7. Consignor in such case not estopped, by the act of consignee . . 322
8. Actions may be brought in the name of bailee, or agent . . 322
9. Recovery in such cases bars the claim of general owner . . 322
10. Where general property in consignee, he should sue . . 322
11. Preponderating evidence must be given 322

CHAPTER XVII.

COMMON CARRIERS OF PASSENGERS.

SECTION I.

DEGREE OF CARE REQUIRED.

		PAGE
1.	Are responsible for the utmost care and watchfulness	323
2.	Duty extends to every thing, connected with the transportation	323–327
3.	But will not extend to an insurance of safety	327, 328
4.	Will make no difference, if passenger does not pay fare	328, 329
5.	So too where the train is hired for an excursion, or is under control of state officers	329

SECTION II.

LIABILITY, WHERE BOTH PARTIES ARE IN FAULT.

1.	Company not liable unless in fault	329, 330
2.	Not liable where plaintiff's fault contributes directly to injury	330
3.	Company liable, for wilful misconduct, or such as plaintiff could not avoid	330, 331
4.	Plaintiff may recover for gross neglect of company, although in fault himself	331
5.	But not where he knew his neglect would expose him to injury	331
6.	May recover although riding in baggage car	331, 332
7.	Company do not owe such duty to wrongdoers	332
8.	May recover although out of his place on the train	332
9.	Plaintiff affected by negligence of those who carry him	332
10.	Fault on one part will not excuse the other, if he can avoid committing the injury	333
11.	Negligence to be determined by the jury, where evidence conflicts	333
12.	Plaintiff must be lawfully in the place, where injured	333
13.	Passengers bound to conform to regulations of company, and directions of conductors	333

SECTION III.

INJURIES BY LEAPING FROM THE CARRIAGES.

1.	Passengers may recover, if they have reasonable cause to leap from carriage, and sustain injury	334
2.	But not where their own misconduct exposes them to peril	334, 335
3.	But may recover if injured, in attempting to escape danger	335
4.	Cannot excuse leaping from cars, because train passes station	335
5.	Must resort to their action for redress	335
6.	Rule of law, where train passes station	335, 336

SECTION IV.

INJURIES PRODUCING DEATH.

1.	Redress, in such cases, given exclusively, by statute	336
2.	Form and extent of the remedy, under the English statute	336, 337
3.	Where the party is in fault, no recovery can be had	337
4.	By English courts no damages allowed for mental suffering	337
5.	In Pennsylvania, damages measured by probable accumulations	338, 339
6.	In Massachusetts, company subjected to fine not exceeding $5,000	339
7.	Wife cannot maintain the action, for death of husband, or father, for death of child	339
8.	Form of the indictment	339
9.	If those having charge of passengers, not *sui juris*, leave them exposed, company not liable	340

10. No action lies if death caused by neglect of fellow-servant or by machinery, ... PAGE 340, 341
11. Servant liable for consequences of using defective machinery . 341

SECTION V.

SUITS WHERE THE INJURED PARTY IS A MARRIED WOMAN . 341

SECTION VI.

LIABILITY, WHERE TRAINS DO NOT ARRIVE IN TIME.

1. Company liable to deliver passenger according to contract . . 342
2. May excuse themselves, by special notice 342
3. Liable for damages, caused by discontinuance of train . . 342
4. Not liable for injury, caused by stage company, connecting with railway 343

SECTION VII.

WHAT WILL EXCUSE COMPANY FROM CARRYING PASSENGERS.

1. Company not bound to carry, where carriages full . . . 344
2. But must carry according to terms which they advertise . . 344
3. Not bound to carry disorderly passengers or those otherwise offensive 344, 345

SECTION VIII.

RULE OF DAMAGES FOR INJURIES TO PASSENGERS.

1. All damage, present and prospective, is recoverable . . . 345
2. But these should be obvious, and not merely conjectural . . 345, 346
3. New trials allowed for excessive damages 346
4. But this only allowed, in extreme cases 346
5. Counsel fees not to be considered 346
6. Some English judges doubt if damages should be claimed as compensation for pain 346, 347
7. Not so viewed generally 347
8. Plaintiff may show value of his time lost 347
9. Generally rests very much in discretion of jury . . . 347, 348
10. In actions for loss of service, cannot include mental anguish . . . 348

SECTION IX.

CARRIERS OF PASSENGERS AND GOODS CANNOT DRIVE WITHIN THE PRECINCTS OF A RAILWAY STATION . . . 348, 349

SECTION X.

DUTY RESULTING FROM THE SALE OF THROUGH PASSENGER TICKETS, IN THE FORM OF COUPONS.

1. Not the same, as where goods and baggage are ticketed through . 349
2. It is to be regarded, as a distinct sale of separate tickets for different roads 349, 350
3. The first company are to be regarded, as agents for the others . 350
4. If the business of the entire line is consolidated, it is different . 350
5. But in general it is not regarded, as a case of partnership . . 350

SECTION XI.

HOW FAR THE DECLARATIONS OF THE PARTY ARE COMPETENT EVIDENCE.

1. Are competent to show state of health, in connection with other facts 351
2. But not to show the manner in which the injury occurred . 351

SECTION XII.

PASSENGERS WRONGFULLY EXPELLED FROM CARS.

1. Company were not held liable for exemplary damages unless they ratified the expulsion . . . . . PAGE 351
2. But upon principle the company should be liable for special damage 352
3. Are trespassers if they refuse to deliver baggage in such cases . 352

SECTION XIII.

PAYING MONEY INTO COURT, IN ACTIONS AGAINST PASSENGER CARRIERS.

1. Payment into court in general count, and tort, only admits damages to extent of sum paid 352, 353
2. But in cases of special contract, admits the contract and breach alleged 353

SECTION XIV.

LIABILITY WHERE ONE COMPANY USES THE TRACK OF ANOTHER.

1. Statement of the facts of a case 353
2. Company not liable to passengers for torts committed by strangers 354
3. Same liability towards passengers coming from other roads, as in other cases 354

CHAPTER XVIII.

EXCESSIVE TOLLS, FARE, AND FREIGHT.

1. English companies created sometimes, for maintaining road only . 355
2. Where excessive tolls taken may be recovered back . . 355
3. So also may excessive fare and freight 355
4. By English statute, packed parcels must be rated in mass . 356
5. Nature of railway traffic requires unity of management and control . 356
6. Tolls upon railways almost unknown here. Fare and freight often limited 356
7. Guaranty of certain profit on investment lawful 356
8. Restriction of freight to certain rate per ton, extends to whole line 356
9. Need not declare for tolls 357
10. Mode of establishing, and requisite proof 356

CHAPTER XIX.

LIABILITY FOR FIRES, COMMUNICATED BY COMPANY'S ENGINES.

1. Fact of fires being communicated evidence of negligence . . 357
2. This was at one time questioned in England . . . 357
3. Opinion of Tindal, Ch. J., upon this point . . . 357, 358
4. English companies feel bound to use precautions against fire 358, 359
5. Rule of evidence, in this country, more favorable to companies . 359
6. But the company are liable for damage by fire through want of care on their part 359
7. One is not precluded from recovery, by placing buildings in an exposed situation 359
8. Where insurers pay damages on insured property may have action against company 359, 360
9. Where company made liable for injury to all property, are allowed to insure 360

CHAPTER XX.

INJURIES TO DOMESTIC ANIMALS.

1. Company not liable unless bound to keep the animals off the track . 361

PAGE
2. Some cases go even further, in favor of the company . . 361
3. Not liable where the animals were wrongfully abroad . 361, 362
4. Not liable for injury to animals, on land, where company not bound to fence 362
5. Where company bound to fence are *primâ facie* liable for injury to cattle 362
6. But if owner is in fault, company not liable 362, 363
7. In such case company only liable for gross neglect, or wilful injury 363
8. Owner cannot recover, if he suffer his cattle to go at large, near a railway 363, 364
9. Company not liable in such case, unless they might have avoided the injury 364
10. Where company are required to keep gates closed, are liable to any party injured by omission 364
11. Opinion of *Gibson*, Justice, on this subject 364, 365
12 and 17. Not liable for consequences of the proper use of their engines 365, 367
13. Questions of negligence ordinarily to be determined by jury . 365, 366
14. But this is true only, where the testimony leaves the question doubtful 366
15. Actions may be maintained sometimes, for remote consequences of negligence 366
16 and 18. Especially where a statutory duty is neglected by company 366, 367

CHAPTER XXI.

FENCES.

SECTION I.

UPON WHOM RESTS THE OBLIGATION TO MAINTAIN FENCES.

1. By the English statute, there is a separate provision made for fencing 368, 369
2. This provision is there enforced against the companies by mandamus 369
3. But where no such provision exists, the expense of fencing is part of the land damages 369
4. And where that is assessed, and payment resisted by the company, the land-owner is not obliged to fence 369
5. In some cases it has been held the fencing is to be done equally, by the company and the land-owner 370, 371
6. Assessment of land damages, on condition company build fences, raises an implied duty on their part 372
7. In some states, owners of cattle not required to confine them upon their own land 372
8. Lessee of railway bound to keep up fences and farm accommodations 373
9. Company bound to fence land acquired by grant 373
10. Farm-crossings required wherever necessary 373
11. Where land-owner declines farm accommodations 373
12. Fences and farm accommodations not required for safety of servants and employees 373, 374
13. Requisite proof where company liable for all cattle killed . . 374

SECTION II.

AGAINST WHAT CATTLE THE COMPANY IS BOUND TO FENCE.

1. At common law every owner bound to restrain his own cattle . 374
2. And if bound to fence, against others' land, it extends only to those cattle rightfully upon such land 374, 375
3. Company may agree with land-owner to fence, and this will excuse damage to cattle 376
n. 5. Review of cases upon this subject 375, 376

CHAPTER XXII.

LIABILITIES IN REGARD TO AGENTS, SUB-AGENTS, AND CONTRACTORS.

SECTION I.

LIABILITY FOR ACTS AND OMISSIONS OF CONTRACTORS AND THEIR AGENTS.

PAGE

1. Company not ordinarily liable for the act of the contractor, or his servant 377
2. But if the contractor is employed to do the very act, company is liable 378
3. American courts seem disposed to adopt the same rule . . 378
4. Distinction attempted between liability for acts done upon movable and immovable property, not maintainable . . . 378, 379
5. Cases referred to where true grounds of distinctions are stated . 379
6. No proper ground of distinction, in regard to mode of employment 379
7. Proper basis of company's liability explained . . . 379

SECTION II.

LIABILITY OF THE COMPANY FOR THE ACTS OF THEIR AGENTS AND SERVANTS.

1. Courts manifest disposition to give such agents a liberal discretion . 380
2. Company liable for torts, committed by agents, in discharge of their duties 380
3. May be liable for wilful act of servant, in the range of his employment 381
4. Some of the cases hold it necessary to show the assent of the company 381–384
n. 6. Cases upon this subject reviewed 381–384
5. Most of the cases adhere to the principle of *respondeat superior* 382–384
6. But it seems not to have been considered, that the company is present 384, 385
7. The cases seem to regard the company, as always absent . . 385
8. In cases where the company owe a special duty, the act of the servant is always that of the company 385
9. It seems more just and reasonable to regard the company as always present, in the person of their agent 385, 386

SECTION III

INJURIES TO SERVANTS, BY NEGLECT OF FELLOW-SERVANTS, AND USE OF MACHINERY.

1. In general no such cause of action exists against company . . 386
2. But if there is any fault, in employing unsuitable servants or machinery, are liable 387
3. But not liable, for deficiency of help, or for not fencing road . . 387
4. Has been questioned whether rule applies to servants of different grades 387, 388
5. Rule not adopted in some states. Case of slaves. Scotland . 388–390
6. No implied contract, by ship-owners, that ship is sea-worthy . 389, 390
7. But rule does not apply, where servant has no connection with the particular work 390
n. 9. Cases reviewed in England, Scotland, and America . . 388–390

SECTION IV.

INJURIES BY DEFECTS IN HIGHWAYS, CAUSED BY COMPANY'S WORKS.

1. Liable for injuries caused by leaving streets in insecure condition . 391
2. Municipalities liable primarily to travellers suffering injury . 391, 392
3. They may recover indemnity of the company 392
4. Towns liable to indictment. Company liable to mandamus, or action 392

SECTION V.

LIABILITY FOR INJURY IN THE NATURE OF TORTS.

PAGE

1. Railway crossings upon a level always dangerous . . . 393
2. Company not excused, by use of the signals required by statute 393, 394
3. Party cannot recover, if his own act contributed to injury . . 394
4. But company liable still, if they might have avoided the injury . 394
5. If company omit proper signals, not liable, unless that produce the injury 394
6. Not liable for injury to cattle trespassing, unless guilty of wilful wrong 394
7. General definitions of company's duty 395, 396
8. Action accrues from the accruing of the injury 396
9. Where injury is wanton, jury may give exemplary damages . 396

SECTION VI.

MISCONDUCT OF RAILWAY OPERATIVES SHOWN BY EXPERTS.

1. The management of a train of cars is so far matter of science, and art, that it is proper to receive the testimony of experts . . 396, 397
2. In cases of alleged torts company not bound to exculpate . . 397
3. So, too, the plaintiff is not bound to produce testimony from experts . 397
4. The jury are the final judges in such cases. But omission to produce testimony of experts will often require explanation . . 397, 398
n. 5. General rules of law in regard to the testimony of experts . . 398

CHAPTER XXIII.

RAILWAY DIRECTORS.

SECTION I.

EXTENT OF THE AUTHORITY OF RAILWAY DIRECTORS.

1. Notice to one director, if express, sufficient . . . 399, 400
2. Applications to the legislature for enlarged powers, and sale of company's works, require consent of shareholders . . . 400
3. Constitutional requisites must be strictly followed . . . 400
4. Directors, or shareholders, cannot alter the fundamental business of the company 400
5. Inherent difficulty of defining the proper limits of railway enterprise 400, 401
n. 7. Opinion of Lord *Langdale*, and review of cases, on this subject 401–404

SECTION II.

WHEN DIRECTORS BECOME PERSONALLY LIABLE.

1. Not liable personally, for any lawful act done as directors . 402–404
2. But are liable upon express undertaking, to be personally holden 404, 405
3. Are liable personally, if they assume to go beyond their powers . 405
4. Extent of powers affected often, by usage and course of business . 405
5. But if contract is beyond the power of company, or not in usual form, directors personally liable 405
6. Statement of case illustrating last point 405

SECTION III.

COMPENSATION FOR SERVICE OF DIRECTORS.

1. In England, directors of railways not entitled to compensation for services 406
2. But the company may grant an annuity to a disabled officer . 406
3. In this country are entitled to compensation, in conformity to the order of the board 406

SECTION IV.

PAGE

RECORDS OF THE PROCEEDINGS OF DIRECTORS, 407

SECTION V.

AUTHORITY OF DIRECTORS TO BORROW MONEY, AND BUY GOODS.

1. Authority of directors to bind company, express or implied . 407
2. General agent will bind company within scope of his duties. Directors presumed to assent to his contracts 407, 408
3. Contracts under seal of company *primâ facie* bind them . . 408, 409
4. Strangers must take notice of general want of authority in directors, but not of mere informalities 409
5. Cannot subscribe for stock of other companies 409
6. May borrow money if requisite 409

SECTION VI.

DUTY OF RAILWAY DIRECTORS TO SERVE THE INTERESTS OF COMPANY.

1. General duty of such office defined 410
2. Claim for secret service and influence with directors . . 410
3. Opinion of Justice Hoffman upon the legality of such contracts 410–415
n. 3. Cases reviewed upon the subject of secret services . . . 411, 414

SECTION VII.

RIGHT TO DISMISS EMPLOYEES. RULE OF DAMAGES WHEN DONE WRONGFULLY.

1. Some cases hold that if wrongfully dismissed, may recover salary 415, 416
2. English courts do not favor this view. Case stated by English judges 416
3. The American cases have sometimes taken the same view . 417
4. Where the contract provides for a term of wages, after dismissal, it is to be regarded as liquidated damages 417
5. Statute remedy, in favor of laborers of contractors, extends to laborers of sub-contractors 417

CHAPTER XXIV.

ARRANGEMENTS BETWEEN DIFFERENT COMPANIES.

SECTION I.

LEASES, AND SIMILAR CONTRACTS, REQUIRE THE ASSENT OF LEGISLATURE.

1. By English statutes one company may pass over road of another, but contract binding 418
2. But cannot transfer duty of one company to another, without legislative grant 418, 419
3. Original company liable to public after such lease 419
4. Courts of equity enjoin companies from leasing, without legislative consent 420
5. But such contracts, made by legislative grants, are to be carried into effect 420
6. Majority of company may obtain enlarged powers, with new funds 420, 421
7. So the majority may defend against proceedings in legislature . 421, 422
8. Legislative sanction will not render valid, contracts *ultra vires* . 422
9. Railway company cannot assume duties of ferry, without legislative grant 422

SECTION II.

NECESSITY OF CONTRACTS OF CORPORATIONS BEING UNDER SEAL.

1. The English courts manifest great reluctance to abandon the former rule of law on this subject . . . . . PAGE 423
n. 2. Extended review of the English and some of the American cases 423–428

SECTION III.

DUTY OF THE RESPECTIVE COMPANIES TO PASSENGERS AND OTHERS.

1. Company bound to keep road safe. Act of other companies no excuse 424 428
2. Some cases hold that passengers can only sue the company carrying them 429, 430
3. Passenger carriers bound to make landing-places safe 430
4. But those who ride upon freight trains, by favor, can only require such security as is usual upon such trains 430
5. Owners of all property bound to keep it in state, not to expose others to injury 430
6. This rule extends to railways, where persons are rightfully upon them 430, 431
n. 3. Cases, as to the necessity of privity of contract existing, reviewed 430

SECTION IV.

EXTENT OF THE POWERS AND DUTIES OF LESSEES OF RAILWAYS.

1. Statement of the points in an important English case . . 431–434
2. Lessees of railway liable for their own acts, and for many acts of lessors 434, 435

SECTION V.

CONTRACTS BETWEEN DIFFERENT COMPANIES REGULATING THE TRAFFIC 435, 436

SECTION VI.

WHAT IS REQUISITE TO CONSTITUTE A PERPETUAL CONTRACT, BETWEEN DIFFERENT RAILWAY COMPANIES . . . 436

SECTION VII.

CONTRACTS BY RAILWAYS ULTRA VIRES, AND ILLEGAL.

1. Contracts to make erections not authorized by their charter . 436, 437
2. Contracts to indemnify other companies against expense . . 437
3. Contracts to divide profits 437

SECTION VIII.

COMPANIES EXONERATED FROM CONTRACTS, BY ACT OF THE LEGISLATURE 437, 438

SECTION IX.

WIDTH OF GAUGE. JUNCTION WITH OTHER ROADS.

1. Where the act requires broad gauge, does not prohibit mixed gauge 438
2. Permission to unite with other road, signifies a road *de facto* . 438
3. Equity will enjoin company against changing gauge sometimes 438, 439
4. Contract to make gauge of the companies the same, although contrary to law of state, at its date, may be legalized by statute . . 439

CHAPTER XXV.

MANDAMUS.

SECTION I.

GENERAL RULES OF LAW GOVERNING THIS REMEDY. PAGE

1. Regarded as a supplementary remedy 440
2. Mode of procedure; 1. Matter of discretion. 2. Alternative writ . 440, 441
3. Proceedings in most of the American courts 441
4. English courts do not allow application to be amended . . 442
5. Recent English statute has essentially simplified proceedings . . 443
6. Mode of trying the truth of the return 443, 444
7. Costs rest in the discretion of court 444
8. Mode of service 444, 445
9. By late English statutes, mandamus effects specific performance . 445

SECTION II.

PARTICULAR CASES WHERE MANDAMUS LIES TO ENFORCE DUTY OF CORPORATIONS 445

SECTION III.

MANDAMUS TO COMPEL COMPANY TO COMPLETE THEIR ROAD.

1. English courts have required this upon a general grant . 446–453
2. But these cases overruled. Not required now, unless under peculiar circumstances 453

SECTION IV.

IN WHAT CASES THIS IS THE PROPER REMEDY.

1. Where the act is imperative upon the company to build road 453, 454
2. Mandamus more proper remedy than injunction . . . 454
3. Commissioners of public works not liable to this writ . . . 454
4. Public duties of corporations may be so enforced . . . 455
5. Facts tried by jury. Instances of this remedy . . . 455
6. Cannot be substituted for *certiorari*, when that is taken away . . 456
7. Requiring costs to be allowed 456
8. Other instances of its application 456
9. Lies where the duty is clear, and no other remedy . . 456
10. Not awarded to control legal discretion . . . 456, 457
11. Does not lie to try the legality of an election . . . 457

SECTION V.

PROPER EXCUSES, OR RETURNS TO THE WRIT.

1. Company may return that powers had expired at date of writ 457, 458
2. May show want of funds to perform duty 458
3. But cannot show that road is not necessary, or would not be remunerative 458
4. May quash part of return, and require answer to remainder . 458–459
5. Counsel for writ entitled to begin and close 459
6. Cannot impeach the statute, in reply to the writ . . . 459
7. Peremptory writ cannot issue till whole case tried . . . 459
8. Will not quash return summarily 459
9. No excuse allowed for not complying with peremptory writ . . 459

SECTION VI.

WHERE THE ALTERNATIVE WRIT REQUIRES TOO MUCH, IT IS BAD, FOR THAT WHICH IT MIGHT HAVE MAINTAINED . . 460

SECTION VII.

ENFORCING PAYMENT OF MONEY AWARDED AGAINST RAILWAYS.

PAGE

1. The enforcement of payment of money against corporations by mandamus 460
2. Where debt will lie, the party not entitled to mandamus . . 461
3. Mandamus proper to compel payment of compensation under statute 461
4. Mandamus not allowed in matters of equity jurisdiction . . 461, 462
5. Contracts of company not under seal enforced by mandamus . . 462
6. Where a statute imposes a specific duty, an action will lie . . 462

SECTION VIII.

THE WRIT SOMETIMES DENIED IN MATTERS OF PRIVATE CONCERN.

1. Mandamus denied to compel company to divide profits . 462, 463
2. Allowed to compel production and inspection of corporation books 463
3. Will compel the performance of statute duty, but not to undue, what is done 463, 464
4. Allowed to compel the production of the register of shares, or the registry of the name of the owner of shares, and in other cases . 464
5. It is the common remedy for restoring persons to corporate offices of which they are unjustly deprived 464, 465

SECTION IX.

THIS REMEDY LOST BY ACQUIESCENCE. PROCEEDING MUST BE BONA FIDE.

1. Remedy must be sought at earliest convenient time . . . 466
2. Courts will not hear such case, merely to settle the question . 466
3. In New York may be brought any time, within statute of limitations 466

SECTION X.

MANDAMUS ALLOWED WHERE INDICTMENT LIES.

1. Party may have mandamus sometimes where act is indictable . 467
2. Allowed to compel company not to take up their rails . . 467
3. Will not lie where there is other adequate remedy . . . 467

SECTION XI.

JUDGMENT UPON PETITION FOR MANDAMUS REVISABLE IN ERROR . 468

CHAPTER XXVI.

WRIT OF CERTIORARI.

SECTION I.

TO REMOVE PROCEEDINGS AGAINST RAILWAYS.

1. Lies to bring up unfinished proceedings, or those not according to the common law 469
2. This writ is one of very extensive application, unless controlled by statute 469
3. Where the cause is fully heard on the application, judgment may be entered 470

SECTION II.

WHERE THERE IS AN EXCESS OF JURISDICTION . . 470

SECTION III.

JURISDICTION AND MODE OF PROCEDURE.

1. Lies in cases of irregularity, unless taken away by statute . . 471

PAGE

2. Inquisitions before officers not known in the law . . . 471
3. Granting the writ is matter of discretion. Defects not amendable . 471

CHAPTER XXVII.

INFORMATION IN THE NATURE OF QUO WARRANTO.

1. General nature of the remedy 472
2. Its exercise confined to the highest court of ordinary civil jurisdiction 472
3. In the English practice, this remedy not extended to private corporations 472, 473
4. In this country it has been extended to such corporations . . 473
5. This remedy will only remove an usurper, but not restore the one rightfully entitled 473

CHAPTER XXVIII.

EQUITY JURISDICTION IN REGARD TO RAILWAYS.

SECTION I.

INJUNCTIONS AGAINST RAILWAY COMPANIES.

1. Courts of equity will not assume the control of railway construction 474
2. Will restrain company from taking lands by indirection . 474, 475
3. Will restrain railway company, when exceeding its powers . . 475
4. If company have power to pass highways, board of surveyors cannot stop them 475, 476
5. Board of surveyors should apply to the tribunals of the country 476
6. Equity will restrain company, from exceeding powers, or if they have ceased 476
7. Injunctions to enforce the payment of compensation for land . 476
8. Injunction suspended on assurance of payment, by short day 476, 477
9. Course of equity practice must conform to change of circumstances 477
10. The course of proceeding in American courts of equity is the same 477
n. 11. Review of the cases upon this subject . . . 477–479

SECTION II.

INJUNCTIONS TO PROTECT THE RIGHTS OF LAND-OWNERS, AND OF THE COMPANY.

1. Company restrained from taking less land than specified in notice 478–480
2. Sometimes injunction refused, where great loss will ensue . . 480
3. Will not enjoin company to try constitutionality of their act . 480
4. May be restrained from carrying passengers beyond their limits . 481
5. So also from taking land beyond the reasonable range of deviation 481
6. But not where the company have the right to take the land . 481

SECTION III.

EQUITABLE INTERFERENCE IN REGARD TO THE WORKS.

1. No universal rule upon the subject of equitable interference . . 481
2. These matters often arranged by mutual concessions, and an issue at law 481, 482
3. Cases illustrating the mode of proceeding in courts of equity 482–484
4. Where company required to do least possible damage . . 484

SECTION IV.

FURTHER INSTANCES OF EQUITABLE INTERFERENCE AS TO WORKS.

1. In a clear case equity will direct the mode of crossing highways . 484, 485
2. Mandamus the more appropriate remedy in such cases . . 485
3. Towns may maintain bill in equity to protect highways . . 485, 486

SECTION V.

INJUNCTIONS TO CARRY INTO EFFECT ORDERS OF RAILWAY COMMISSIONERS.

PAGE
1. Railway companies perform important public functions . . 486, 487
2. Courts of equity will enforce order of railway commissioners, without revising 487

SECTION VI.

EQUITABLE INTERFERENCE WHERE COMPANY HAVE NOT FUNDS.

1. English courts will not allow company to take land, when their funds fail 487, 488
2. This has been qualified by later cases, and is very questionable . 488
3. Equity will not interfere where company propose to complete but part of works 489
n. 4. Cases reviewed, and result stated 489

SECTION VII.

EQUITABLE CONTROL OF THE MANAGEMENT OF RAILWAY COMPANIES.

1. Courts of equity will not interfere in matters remediable by shareholders 490
2. Will not restrain company from declaring dividend till works are finished 490
3. Will interfere to enforce public duty rather than a private one . 490
4. Will restrain such companies from diverting funds to illegal use . 490
5. Interference of court of equity cannot be claimed upon the assumption of the practical dissolution of company . . . 491–493
6. Directors liable to same extent, as other trustees . . 493, 494
7. Managing committee not chargeable with the fraudulent acts of its members 494
8. Courts of equity will not enforce resolutions of directors or company 494, 495
9. Suits in equity in favor of minority against majority . . 495
10. Minority may insist upon continuing the business till charter expires . 495
11. Minority may have bill against directors for not resisting illegal tax 495
12. Company may expend funds in resisting proceedings in parliament 495
13. Equity will not compel directors to declare dividend, unless they wilfully refuse 495
14. Directors only liable for good faith and reasonable diligence . . 495

SECTION VIII.

APPLICATIONS TO LEGISLATURE FOR ENLARGED POWERS.

1. Equity will not restrain railway companies from petition for enlarged powers 496
2. The early English cases favored such applications . . 496, 497
3. The proper limitations stated 497

SECTION IX.

SPECIFIC PERFORMANCE.

1. Courts of equity will often hold control over railway contracts, referring the question of law to the courts of law . . 497, 498
2. But where the legal right is clear, equity will not interfere . 498
3. And where the affidavits are conflicting, court declined interfering . 498
4. So, too, where the company agreed to stop at a refreshment station 498
5. So also, if there is doubt of the legality of the contract, or its character 499
6. A contract between different companies for the use of each other's track is permanent, and will be enforced in equity . . 499
7. Will decree specific performance in regard to farm accommodations 499

SECTION X.

INJUNCTIONS RESTRAINING ONE COMPANY FROM INTERFERING WITH EXCLUSIVE FRANCHISES OF ANOTHER.

PAGE

1. Equity exercises a preventive jurisdiction in such cases . 499, 500
2. Will not interfere where the legal right is doubtful . . 500
3. Unless to prevent irreparable injury, multiplicity of suits, or where legal remedy is inadequate 500
4. Statement of facts and mode of procedure in such a case . . 500
5. Injunction against different lines, so connecting, as to create competing line 501
6. Many cases take similar view 501
7. Railway not regarded as an infringement of the rights of a canal 501, 502
8. But will be restrained from filling up the canal . . . 502

SECTION XI.

INJUNCTIONS AGAINST THE INFRINGEMENT OF CORPORATE FRANCHISES, IN THE NATURE OF NUISANCE.

1. Allowed to prevent multiplicity of suits, collisions, and riots . 502
2. Lord Brougham's definition of the jurisdiction . . . 502, 503
3. Definition of same by Chief Justice Shaw . . . 503
4. Statement of the general grounds of equitable interference . 503

SECTION XII.

INJUNCTIONS TO PRESERVE PROPERTY PENDENTE LITE.

1. Will not decree specific performance, where mere question of damages 503, 504
2. Where injunction might operate harshly, parties put under terms . 504
n. 2. Review of cases upon this subject 504, 505

SECTION XIII.

INJUNCTIONS RESTRAINING PARTIES FROM PETITIONING LEGISLATURE.

1. Right claimed to exist, but rarely exercised, by courts of equity . 505
2. Not sufficient, that it will interfere with rights of other parties 505, 506
3. Where right doubtful may be sent to court of law for determination 506

SECTION XIV.

INTERFERENCE OF COURTS OF EQUITY IN THE SALE AND DISPOSITION OF THE EFFECTS OF INSOLVENT COMPANIES.

1. Will interfere to save costs and litigation 506
2. All parties interested may come in 506

SECTION XV.

MANNER OF GRANTING AND ENFORCING EX PARTE INJUNCTIONS.

1. Such injunctions especially liable to abuse 507
2. In important cases not allowed except upon notice to other party . 507
3. Injunction commonly dissolved, upon answer denying equity . 507
4. Remarks of Lord Cottenham upon this subject 507–509
5. Party who obtains such injunction on imperfect state of facts liable to costs 509

SECTION XVI.

RIGHT TO INTERFERE BY INJUNCTION LOST BY ACQUIESCENCE.

1. Acquiescence to extinguish right, must have operated upon other parties 510

PAGE
2. Delay, to learn the extent of injury, will not estop the party . 510
3. Acquiescence has been held not always perfectly to express the idea 510, 511

SECTION XVII.

MANDATORY INJUNCTIONS SOMETIMES ALLOWED.

1. Injunctions may produce mandatory effect, but must be specific . 511
2. A decree for specific performance is a mandatory injunction . 511, 512

SECTION XVIII.

REMEDY PROVIDED IN CHARTER DOES NOT SUPERSEDE RESORT TO EQUITY.

1. Special provisions of charter, do not commonly affect the jurisdiction of courts of equity 512
2. Recent English statutes supersede such jurisdiction chiefly, in suits at law 512

SECTION XIX.

WILFUL BREACHES OF INJUNCTIONS.

1. Statement of case 513
2. Opinion of Vice-Chancellor 513, 514

SECTION XX.

QUESTIONS OF COSTS IN EQUITY.

1. Costs most commonly awarded to prevailing party 514
2. If parties compromise merits, court will not decide question of costs 514

CHAPTER XXIX.

INDICTMENT.

SECTION I.

INDICTMENTS AGAINST RAILWAY COMPANIES.

1. Are liable to indictment for obstructing public highway . . 515
2. Corporations liable to indictment for misfeasance, as well as non-feasance 516, 517
3. Not liable to indictment for disturbing quiet, by proper use of locomotives 517
4. Where the company have the right to divert highways, it is for the jury to determine, whether it is done in a reasonable manner . 517, 518
5. All that is requisite is, that it produce no serious public inconvenience 518
6. Order, or conviction of company, in relation to repair of highways, may be general 518
7. Signals required to be given, at highway crossings, on level . 518, 519
n. 2. Review of the cases upon the subject 515–517

SECTION II.

HOW FAR RAILWAYS MAY BECOME A PUBLIC NUISANCE.

1. Use of public streets of a city, by permission of city authorities, by railway, not a nuisance 519
2. But the use of locomotives, in vicinity of a church, on Sunday, may become a nuisance 519
3. City authorities may grant railway leave to use streets, or to tunnel 519, 520
4. But company must not unnecessarily interfere with comfort of others in such use 520
5. The slight obstruction of navigable waters, by railway company, authorized by act of legislature, not a nuisance 520

PAGE

6. Such grants construed strictly. Any excess of authority becomes a nuisance 520
7. Company not justified in building stations, for passengers, or freight, in highway 520

SECTION III.

INDICTMENT FOR OFFENCES AGAINST RAILWAYS.

1. Railway tickets chattels. Railway pass subject of forgery . . 521
2. Under the English statute, indictments for obstructing railway carriages, or endangering persons therein 522
n. 4. Loss of railway ticket. Negotiability of same . . . 521, 522

CHAPTER XXX.

TAXATION.

SECTION I.

ASSESSMENTS UPON RAILWAY WORKS, AND UPON STOCK, OR SHARES.

1. Under English statutes, company assessed for net profits, in each parish 523
2. This may be increased by the traffic, or by smallness of repairs, in the parish 524
3. Depreciation of road by time, to be taken into account . . 524
4. Mode of estimating yearly net profits 524, 525
5. Rule stated in several of the American states 525–527
6. Liability to taxation, on railway stock, same as other personal property 527, 528
n. 10. Right of legislature, to exempt company, or stock, from taxation 526, 527
7. Railways not generally held liable to taxation, as a fixture, under general laws 528
8. Such erections, as are necessary to the use of a railway, are not taxable separate from the road 528, 529
9. But erections of mere convenience, for profit, may be . . . 529
10. Or such, as are without the limits of land, allowed to be taken, compulsorily 529

SECTION II.

LEGISLATIVE EXEMPTION FROM TAXATION.

1. General nature of such exemptions stated 529, 530
2. General exemption from taxation includes stock 530
3. Qualifications of the general rule 530, 531
4. Exemption of the capital stock, includes all property of the company, necessary to its business 531
5. Exemption, with exception, includes all modes of taxation, but that one 531
6. Union of companies, where some are exempted from taxation and some not 531
7. Construction of a qualified exemption from taxation 531
8. Such exemptions declared unconstitutional 531, 532
9. Where railway works are taxed indirectly, they cannot be taxed directly also 532
10. Qualified exemptions held valid, and inviolable 532, 533
11. Exemptions from taxation should be held temporary, where they will bear that construction 533

SECTION III.

RIGHTS OF TOWNS AND COUNTIES TO SUBSCRIBE FOR RAILWAY STOCK.

1. Such subscriptions held valid, if authorized by legislature . 533, 534

PAGE
2. Such subscriptions, in another state or province, held valid . . 535
3. Lateral railway acts in Pennsylvania constitutional . . 535
4, and n. 2. Some courts and judges have dissented from the general view 535, 536
5. Such acts have received a very strict construction . . . 536
n. 1. Cases reviewed 533, 534

CHAPTER XXXI.

CONSTITUTIONAL QUESTIONS.

SECTION I.

WHEN RAILWAY GRANTS ARE PARAMOUNT AND EXCLUSIVE.

1. In the English Constitution there is no restriction upon the legislature 537
2. Limitation in United States Constitution, upon the subject . 537, 538
3. Essential requisites to constitute an exclusive franchise, or grant . 539
4. Construction of such grant by the tribunal of last resort . . 539, 540
5. Opinion of Massachusetts Supreme Court upon the subject . . 540
6. Grants of the use of navigable waters, for manufacturing, revocable 541–543
7. Forfeiture, for the benefit of a county, may be remitted by legislature 544–546
8. Where the legislature repeal the charter of a corporation. Presumptions 547
9. Statement of an important case in Louisiana . . . 547, 548

SECTION II.

POWER OF THE LEGISLATURE TO IMPOSE RESTRICTIONS UPON EXISTING CORPORATIONS.

1. Are subject to legislative control in regard to police . . . 549
2. n. 1. Opinion of court in a case, as to railways . . . 549
3. Important early case in Maryland 550–554
4. Extent of a reserved power to repeal charters of corporations 555–558
5. Where the charter is expressly exempted from legislative control 559, 560
6. Effect of public patronage in regard to legislative control . 560

SECTION III.

CONSTRUCTION OF EXCLUSIVE RAILWAY GRANTS.

1. Such grants are to receive a strict construction in favor of the company 561
2. How far such companies can claim under implied grant . . 561
3. Ambiguous terms construed most strongly against the company . 562

CHAPTER XXXII.

RAILWAY INVESTMENTS.

SECTION I.

POWER OF COMPANY TO DO ACTS AFFECTING THE VALUE OF THEIR STOCK AND BONDS. OVERISSUE OF STOCK.

1. The importance and unsettled state of the law upon the subject . 563
2. The English statute requires the stock subscriptions to precede the grant 563, 564
3. Duty of railway directors in regard to speculations in shares . 564
4. Nature and effect of desperate financial expedients in building railways 564–568
4. (1.) Issuing stocks in railways, at different prices, fraudulent . 564–567
4. (2.) Mode of issuing bonds and mortgages objectionable . . 567, 568

PAGE

5. Difficulty of preventing this by legislative restrictions, no excuse . 568
6. Something might be effected by legislation 568
7. These losses fall severely upon small owners 568, 569
8. Overissue of stocks somewhat of a similar character . . 569
9. Case of New York & N. H. Railway before Superior Court . . 569
10. Same case before the Court of Appeals 569, 570
11. The principles involved in similar cases 570, 571
12. Right of canal company to mortgage tolls, without consent of legislature 571

SECTION II.

RIGHTS AND REMEDIES OF BOND-HOLDERS AND MORTGAGEES.

1. Under English statutes tolls only mortgaged. Ejectment will not lie 572
2. But if priority of lien is created, ejectment will lie . . 572, 573
3. The English acts allow no covenant to refund the money, in railway mortgages 573
4. But bond creditors, and mortgagees, where there is no restriction, may have covenant against company 573
5. All parties, standing in same right, necessary parties to bill . 573
6. After appointment of receiver by court of equity, counter claimants cannot contest his rights, except in court of equity, or by their permission 573, 574
7. Priority of right determinable only, upon motion to discharge the order of appointment 574
8. Where charter creates a lien in favor of bill-holders, this is subject to the lien of contractors for construction 574
9. Some American cases hold railway companies may mortgage franchise, without consent of legislature 574, 575
10. Power to buy and sell real estate, and to borrow money, implies the power to mortgage for its security 575
11. Company receiving benefit of money, estopped to deny authority of agent 575
12. The mortgage of the property or of the franchises, by the corporation, does not transfer the title to the corporate franchise . 575, 576
13. Statement of a leading case in New Hampshire . . . 577–589
14. The right to mortgage subsequently acquired property maintained in equity in Kentucky 590
15. Similar decision in equity in New Jersey 590, 591
16. And in the Circuit Court of United States . . . 590, 591

SECTION III.

WHAT DEFENCES ALLOWED THE COMPANY, IN REGARD TO BORROWED CAPITAL.

1. Where the transaction is illegal, no estoppel will preclude its defence 592
2. Company may contract, beyond present powers, on future contingency of obtaining enlarged powers 592, 593
3. Company cannot allege their own fraud in defence . . . 593

SECTION IV.

RIGHT TO ISSUE PREFERRED STOCK. CONVERTING LOAN INTO CAPITAL.

1. The company may issue new stock, and give it preference, as a *bonâ fide* means of borrowing money 593
2. By English statutes, loan may be converted into capital. Terms of statute must be strictly pursued. Courts of equity cannot dispense with them 593

SECTION V.

INVESTING TRUST FUNDS IN RAILWAY SECURITIES.

PAGE
1. General duty of trustees, in regard to making investments . 594
2. English courts have regarded railway securities too uncertain for such purpose 594
3. Statement of a case, upon the subject, in New Hampshire . 597

SECTION VI.

BONA FIDE HOLDER OF RAILWAY BONDS, WITH COUPONS, MAY ENFORCE THEM.

1. Railway bonds payable to bearer, with coupons, negotiable securities . 595
2. This rule extends both to the bonds and coupons for interest . 595
3. Same rule extended to bonds issued by municipal corporations . 596

CHAPTER XXXIII.

DIVIDENDS.

SECTION I.

WHEN DIVIDENDS ARE DECLARED, AND HOW PAYABLE.

1. Dividends should be declared only from net earnings of company . 597
2. Right of shareholders to dividends declared, is several, but joint, before declared 597, 598
3. Lien upon shares creates a lien upon dividends . . . 598
4. Surety on bank-note or bill may restrain transfer of principal's stock 598
5. Action will not lie against company for dividends till demand . 598

SECTION II.

PARTY ENTITLED TO DIVIDENDS WHERE STOCK HAS BEEN FRAUDULENTLY TRANSFERRED.

1. Fraudulent transferree not entitled to dividends, but subsequent *bonâ fide* purchaser may be 598, 599
2. But the *bonâ fide* owner may so conduct as to forfeit his claim 600, 601
3. One who buys stock in faith of the title on company's books may hold as against company 601
n. 1. Review of English decisions 599–601

SECTION III.

GUARANTY OF DIVIDENDS.

1. Guaranty of dividends upon stock for period of years . . 601
2. Rule of damages, in such case 601

CHAPTER XXXIV.

RIGHTS OF CREDITORS AND CORPORATORS.

SECTION I.

DISSOLUTION OF RAILWAYS.

1. Different modes in which railway companies may be dissolved— . 602, 603
(1.) By act of the legislature 602
(2.) By surrender of franchises and acceptance by legislature . 602, 603
(3.) By forfeiture, from abuse or disuse of franchises . . . 603
2. Shareholders not generally liable to creditors . . . 603
3. Shareholders entitled to proportionate share of net profits . 603, 604
4. Liability of subscribers, when scheme is abandoned . . 604

PAGE

5. Commonly liable for share of expenses . . . 604, 605
6. Party receiving shares bound by terms of association . . 605
7. Not being informed, that deposits not paid, no fraud . . . 605
8. Shareholders cannot exonerate themselves by contract with directors 605
9. Corporations cannot give away effects, to prejudice of creditors . 605
10. If charter is repealed, by virtue of power reserved, courts presume it was rightfully done 605, 606

SECTION II.

LEVY UPON PROPERTY OF COMPANY.

1. Where charter creates lien, is paramount to all others . . 606
2. Road, or tolls, not subject to levy of execution . . . 606

SECTION III.

EXECUTION AGAINST SHAREHOLDERS.

1. Mode of obtaining execution under English statute . . 606–608
2. Remedy, in this country, by distinct action, more commonly . 608
3. May proceed in equity 608
4. Payments in land valid 608, 609
5. How stockholders may transfer personal liability . . . 609

SECTION IV.

ASSIGNMENTS BY RAILWAYS IN CONTEMPLATION OF INSOLVENCY 609

CHAPTER XXXV.

BOARD OF TRADE. RAILWAY COMMISSIONERS.

SECTION I.

SUPERVISION OF RAILWAY LEGISLATION . . 610, 611

SECTION II.

SUPERVISION OF RAILWAYS BY BOARD OF TRADE AND RAILWAY COMMISSIONERS.

1. Proceeding in England, in opening railways . . . 611, 612
2. Establish rules for connection 612
3. Connection of branch railways 612
4. Courts of equity will not interfere with decisions of Railway Commissioners 612, 613
5. English courts regulate railways for public accommodation . 613

SECTION III.

RETURNS TO BE MADE TO THE BOARD OF TRADE, OR RAILWAY COMMISSIONERS.

1. May require companies to return traffic and accidents . . 613
2. Third class trains and mail trains 613
3. Time of completing roads 613

CHAPTER XXXVI.

LEGISLATIVE SUPERVISION. POLICE OF RAILWAYS.

SECTION I.

OBLIGATIONS AND RESTRICTIONS IMPOSED BY STATUTE.

1. The benefits, and necessity of legislative control . . . 614

PAGE
2. Provisions of English statute, in regard to traffic . . 614, 615
3. Control of the gauge. Right of public to use railway . . 615

SECTION II.

REGULATION OF RUNNING CARS OR TRAINS, BY MUNICIPAL AUTHORITY.

1. May prohibit the use of steam-power in streets . . 615, 616
2. May do this by virtue of their general control of police . . 616
3. Police during construction of railways in England . . . 616
4. Right of municipalities to make railway grants . . . 616–618

SECTION III.

CARRYING MAILS AND TROOPS AND MUNITIONS OF WAR.

1. In England this is controlled by legislation of the nation . . 619
2. The division of sovereignty creates difficulty on that point . 619
3. But it would seem that the state and national legislatures may control it 619
4. Mail agents may sue company for injury, in England . . 619, 620
5. Same rule adopted in this country 620

CHAPTER XXXVII.

THE CONSOLIDATION OR AMALGAMATION OF COMPANIES.

SECTION I.

THE POWER OF THE LEGISLATURE TO COMBINE COMPANIES 621, 622

SECTION II.

WHAT AMOUNTS TO AN AMALGAMATION OF RAILWAY COMPANIES.

1. Mere association or alliance not sufficient . . . 622, 623
2. Agreement to amalgamate from a day past . . . 623

SECTION III.

WHAT CONTRACTS MADE BEFORE AMALGAMATION ENFORCED AFTERWARDS.

1. Where the amalgamation is legal, all prior contracts may be enforced 623
2. But where any formalities are not complied with, it is otherwise . 623, 624
3. Admissions by the company contracting, good against consolidated company 624
4. Consolidated company may apply funds to pay debts of former companies 624
5. Instance illustrating the right to amalgamate 624

CHAPTER XXXVIII.

MISCELLANEOUS MATTERS.

SECTION I.

JURISDICTION OF THE UNITED STATES COURTS . 625, 626

SECTION II.

LIABILITY FOR DOING AN ACT PROHIBITED BY THE COMPANY'S CHARTER, WITHOUT SPECIAL DAMAGE TO THE PARTY INTERESTED.

SECTION III.

MODE OF RECKONING TIME . . 627

SECTION IV.

SERVICE OF PROCESS UPON NON-RESIDENT COMPANIES.

APPENDIX A.

CHAPTER II.

PUBLIC RAILWAYS.

PRELIMINARY ASSOCIATIONS.

SECTION I.

PAGE

MODE OF INSTITUTING RAILWAY PROJECTS . . . 631–634

SECTION II.

CONTRACTS OF THE PROMOTERS NOT BINDING AT LAW, UPON THE COMPANY 634, 635

SECTION III.

SUBSCRIBERS TO THE PRELIMINARY ASSOCIATION INTER SESE . 635–638

SECTION IV.

CONTRACTS OF THE PROMOTERS ADOPTED BY THE COMPANY . 638

SECTION V.

HOW CONTRACTS OF THE PROMOTERS MAY BE ADOPTED BY THE COMPANY 638, 639

SECTION VI.

CONTRACTS BETWEEN THE PROMOTERS AND OPPOSERS OF A BILL FOR THE CHARTER OF A RAILWAY 639, 641

SECTION VII.

CONTRACTS OF THE PROMOTERS ENFORCED IN EQUITY . . 641–644

SECTION VIII.

CONTRACTS OF THE PROMOTERS BINDING UPON THE COMPANY AT LAW 644–646

SECTION IX.

WHAT CONTRACTS, BETWEEN THE PROMOTERS OF RAILWAYS AND OTHERS, WILL BE ENFORCED, EITHER IN LAW, OR EQUITY, AGAINST THE CONTRACTING PARTIES, OR THE COMPANY . 646–647

SECTION X.

COURTS OF EQUITY WILL ENFORCE CONTRACTS WITH THE PROMOTERS 647

SECTION XI.

SUCH CONTRACTS ENFORCED WHERE THE RAILWAY IS ABANDONED 648–659

SECTION XII.

PRACTICE OF COURTS OF EQUITY IN DECREEING SPECIFIC PERFORMANCE . . . . . PAGE 658–661

SECTION XIII.

SPECIFIC PERFORMANCE IN COURTS OF EQUITY 661, 662

SECTION XIV.

COURTS OF EQUITY WILL RESTRAIN A PARTY FROM OPPOSITION, OR PETITION IN PARLIAMENT 662, 663

SECTION XV.

CONTRACTS TO WITHDRAW OPPOSITION TO RAILWAY PROJECTS, AND TO KEEP THIS SECRET, AGAINST SOUND POLICY, AND WOULD SEEM TO BE ILLEGAL 663–666

APPENDIX B.

CHAPTER XII.

REMEDIES BY LAND-OWNERS UNDER THE ENGLISH STATUTE.

SECTION I.

COMPANY BOUND TO PURCHASE THE WHOLE OF A HOUSE, ETC. 667, 668

SECTION II.

THE COMPANY COMPELLABLE TO TAKE INTERSECTED LANDS, AND THE OWNER TO SELL 665

SECTION III.

EFFECT OF NOTICE TO TREAT FOR THE PURCHASE OF LAND . 669, 670

SECTION IV.

REQUISITES OF THE NOTICE TO TREAT 671, 672

SECTION V.

THE NOTICE MAY BE WAIVED, BY THE PARTY ENTERING INTO NEGOTIATION 672, 673

SECTION VI.

TITLE OF THE CLAIMANT MUST BE DISTINCTLY STATED . 673, 674

SECTION VII.

THE CLAIM OF THE LAND-OWNER MUST CORRESPOND WITH THE NOTICE 665

CHAPTER XIII.

ENTRY UPON LANDS BEFORE COMPENSATION IS ASSESSED.

SECTION I.

LANDS TAKEN OR INJURIOUSLY AFFECTED, WITHOUT HAVING PREVIOUSLY MADE COMPENSATION TO THE PARTIES . . PAGE 676–678

SECTION II.

THE PROCEEDINGS REQUISITE TO ENABLE THE COMPANY TO ENTER UPON LAND 678, 679

SECTION III.

MODE OF OBTAINING COMPENSATION UNDER THE STATUTE, FOR LANDS TAKEN, OR INJURIOUSLY AFFECTED, WHERE NO COMPENSATION IS OFFERED 680

SECTION IV.

THE ONUS OF CARRYING FORWARD PROCEEDINGS . . 680, 681

SECTION V.

EQUITY WILL NOT INTERFERE, BY INJUNCTION, BECAUSE LANDS ARE BEING INJURIOUSLY AFFECTED, WITHOUT NOTICE TO TREAT, OR PREVIOUS COMPENSATION 682

SECTION VI.

SHERIFF'S JURY, OR ARBITRATOR, CANNOT DETERMINE THE QUESTION OF RIGHT IN THE CLAIMANT, BUT ONLY THE AMOUNT OF DAMAGES 683, 684

SECTION VII.

THE EXTENT OF COMPENSATION TO LAND-OWNERS, AND OTHER INCIDENTS BY THE ENGLISH STATUTES 684–686

SECTION VIII.

RIGHT TO TEMPORARY USE OF LAND TO ENABLE THE COMPANY TO MAKE ERECTIONS UPON OTHER LANDS 686, 687

SECTION IX.

RESERVATIONS TO LAND-OWNERS TO BUILD PRIVATE RAILWAY ACROSS PUBLIC RAILWAY 687

CHAPTER XIV.

THE MODE OF ASSESSING COMPENSATION UNDER THE ENGLISH STATUTES.

SECTION I.

BY JUSTICES OF THE PEACE 688

SECTION II.

BY SURVEYORS 689

SECTION III.

PAGE
BY ARBITRATION 689–691

APPENDIX C.

NOTES OF LATER CASES 692–697

TABLE OF CASES.

A.

Page

A. & S. Railway *v.* Baugh 372
A. & S. Railway Co. *v.* Carpenter 135
Abbot *v.* Goodwin 591
Aberdeen Railway *v.* Blakie 22
Abraham *v.* Great Northern Railw. 166
Ackley *v.* Kellogg 284, 286
Adair *v.* Shaw 76
Adams *v.* Clark 315
—— *v.* Frye 49
—— *v.* London and Blackwall Railway 485, 680
—— *v.* Saratoga & Wash. Railway 157, 159
Adderly *v.* Storm 58
Adley *v.* Whitstable Co. 24
Agar *v.* Athenæum Life Ass. Co. 408
—— *v.* Regent's Canal Co. 93, 475, 478, 488
Agricultural Bank *v.* Burr 44
—— *v.* Wilson 44
Alabama & Tenn. Rivers Railway *v.* Kidd 380
Albany Northern Railway Co. *v.* Lansing 135, 138, 156
Albany & Schenectady Railway *v.* Osborn 525
Albany & West Stockbridge Railw. *v.* Canaan 525
Albright *v.* Penn 326
Alden *v.* Pearson 235
Alder *v.* Keighly 264
Aldred *v.* North Midland Railway Co. 191, 662
Aldrich *v.* Cheshire Railway 154, 173
Aldridge *v.* Great W. Railway 357
Alexander *v.* Greene 267
Algeo *v.* Algeo 417
Alleghany *v.* Ohio & Pennsylvania Railw. 163
Alleghany City *v.* McClurkan 404
Allen *v.* Hayward 379
—— *v.* Knight 583
—— *v.* McKeen 560

Page

Allen *v.* Montgomery Railway Co. 73, 574, 575
—— *v.* Sewall 237
—— *v.* Talbot 490
Alton Railway *v.* Northcot 208
Ambergate Railway *v.* Norcliffe 81
Ambergate N. & Boston and E. J. Railway *v.* Coulthard 81, 174
—— *v.* Midland Railway 174
—— *v.* Mitchell 64
Amelung *v.* Seekamp 477
Ammant *v.* New Alexandria and Pittsburgh Turnpike 591, 606
Andover, The case of, 442
Andover Turnpike Co. *v.* Gould 71
Andover Turnpike *v.* Hay 71
Andrews *v.* City of Portland 201
Androscoggin R. *v.* Richards 692–697
Andros. & Kenn. Railw. *v.* Stevens 526
Anonymous 464
Anstruther *v.* East Fife Railway 454
Anthony Street, Matter of 141
Appleford's case 457
Applegate *v.* Lexington & Ohio Railway 159
Armington *v.* Barnet 112, 129, 538, 540, 555
Armory *v.* Delamirie 310
Armstrong *v.* Waterford, &c. Railw. Co. 678
Armsworth *v.* Southeastern Railway 338
Arnold *v.* Mayor of Poole 182, 424, 427
—— *v.* Ruggles 40
Arthur *v.* Commercial & Railroad Bank 125, 588
Ashby *v.* Eastern Railway 140, 141, 176
Ashpitel *v.* Sercombe 604
Ashton *v.* Longdale 38
Assop *v.* Yates 387
Astley *v.* Man. Sh. & Lin. R. 692–697
Aston *v.* Boore 109

Page

Aston *v.* Heaven 323
Asylum *v.* Phenix Bank 456
Atkinson *v.* Pocock 605
Atlantic Cotton Mills *v.* Abbott 79
Atlantic, St. Lawrence Railroad Co. *v.* Commissioners 145
Atlee *v.* Backhouse 355
Attala County *v.* Grant 457
Attorney-General *v.* Birmingham Junct. Railway 473
—— *v.* Birmingham & Oxf. Junct. Railw. and two other companies 454, 489
—— *v.* Davy 20
—— *v.* Detroit & Erie Plank Road Co. 197
—— *v.* Eastern Counties Railway 483, 504
—— *v.* The Eastern Counties & N. & E. Railway 483
—— *v.* Great Northern Railway 513
—— *v.* Hudson R. Railway 167, 520
—— *v.* Leaf 472
—— *v.* London and Southampton Railway 199
—— *v.* London and South W. Railway 485, 513
—— *v.* Manchester and Leeds Railway 506, 510
—— *v.* Mayor of Liverpool 507, 509
—— *v.* Nichol 502
—— *v.* Norwich 496
—— *v.* Oxford, Worcester, & Wolverhampton Railw. 487, 611
—— *v.* Petersburg & Roanoke Railway 603
—— *v.* Sheffield Gas Consumers Co. 502
—— *v.* Stevens 168
—— *v.* Wilson 494
Attorney-General of New York *v.* Mayor & Aldermen of N. Y. 616
Atwood *v.* The Reliance Company 269, 276
Aurora Branch Railw. *v.* Grimes 366
—— *v.* West 692–697
Austin *v.* The Manch. S. & L. Railway 276, 277
Australian Royal Mail Co. *v.* Marzetti 425, 426
Aveson *v.* Kinnaird 351
Aylesbury Railway Co. *v.* Mount 83, 84
—— Railway *v.* Thompson 68

B.

Babcock *v.* The Western Railway 105, 168, 562
Backus *v.* Lebanon 130, 133
Bacon *v.* Charlton 351, 353
Ex parte Bagge 42
Bagshawe *v.* The Eastern Union Railway 490, 632, 649, 653
Bailey *v.* Birkenhead, Lancashire & Ch. J. Railway 493
—— *v.* Mayor of New York 171
—— *v.* Phil. & Wil. Railroad Corp. 167, 559
—— *v.* Western Vt. Railway 226
—— *v.* Wilkins 51
Baker *v.* Boston 560
—— *v.* Brinson 276
—— *v.* Johnson 124, 150
Baldwin *v.* Collins 276
—— *v.* Western Railway 396
Balfe *v.* Lord 581
Baltimore *v.* Baltimore & Ohio Railw. 531
Baltimore & Ohio Railw. *v.* Thompson 398, 155, 182
Baltimore & Ohio Railw. *v.* Wheeling 96
B. & S. Railway Co. *v.* Compton 155
Baltimore & Susquehanna Railw. *v.* Nesbit 118, 151, 560
Baltimore & Susqueh. Railway *v.* Woodruff 359, 396
Bancroft *v.* Peters 692–697
Banet *v.* Alton & Sangamon Railw. 72, 78, 95
Bangor Bridge Co. *v.* McMahon 71, 73
Bangor & Piscataqua Railway *v.* Harris 128, 527
Bank *v.* M'Chord 49
—— *v.* Trimble 603
Bank of Columbia *v.* Patterson 202
Bank of Commonwealth *v.* Curry 49
Bank of Manchester *v.* Allen 11
Bank of the Metropolis *v.* Guttschlick 203
Bank of Penn. *v.* The Commonwealth 192, 666
Bank of the State *v.* Bank of Cape Fear 560
Bank of Toledo *v.* City of Toledo 532
Bank of U. S. *v.* Dandridge 11, 203
—— *v.* The Planters Bank of Georgia 6
Bank of Utica *v.* The City of Utica 527
—— *v.* Smalley 44
Bank of Waltham *v.* Waltham 39
Barber *v.* Essex 391
Barclay *v.* Cuculla-Y-Gana 262
—— *v.* Howell's lessee 126
Bargate *v.* Shortridge 42
Bark Oregon *v.* Newburg's Adm. 321

Page

Barker *v.* Midland Railway Co. 28, 348
—— *v.* N. Staffordshire R. Co. 667
—— *v.* Troy & Rutland Railw. 194, 204, 228
Barnard *v.* Poor 346
—— *v.* Wallis 3, 114
Barned *v.* Hamilton 54
Barnes *v.* Cole 330
—— *v.* Ward 430
Barney *v.* Prentiss 267
Barnsley Canal Co. *v.* Twibill 175
Barrett *v.* Stockton & D. Railway 117
Barrington *v.* Miss. Central Railway 692–697
Barron *v.* Baltimore 113
Barry *v.* Merchant's Exchange Co. 36
Barton *v.* Port Jackson, &c. Plank Road Co. 404
Bassett *v.* Norwich & Worcester Railway 389
—— *v.* Great Northern & Great Midland Railways 613
Bartram *v.* M'Kee 314
Bastard *v.* Bastard 261
Bates *v.* New York Ins. Co. 43
Bath Nav. Co. *v.* Willis 119
Batson *v.* Donovan 273, 274
Battley *v.* Faulkner 600
Batty *v.* Duxbury 391
Battye *v.* Gresley 21
Baxendale *v.* Eastern Counties Railw. 265
—— *v.* Hart 299
—— *v.* North Devon Railway 265
Bayliffe *v.* Butterworth 51
Bayntine *v.* Sharp 358
Bazin *v.* Richardson 309
Bean *v.* Green 268, 271
Beardmer *v.* London & Northwestern Railway 189
Beaty *v.* Knowler 117
Beaulien *v.* Finglam 358
Beck *v.* Evans 273
Beckitt *v.* Bilbrough 632
Beckwith *v.* Sydebotham 398
Beekman *v.* Saratoga & L. Railway 111, 560
—— *v.* Shouse 271
Beene *v.* Cahawba & Marion Railway Co. 72
Beers *v.* Housatonic Railway 330, 365
Belknapp *v.* Belknapp 478
Bell *v.* Francis 634
—— *v.* Gough 166
—— *v.* The Hull & Selby Railway 169, 176, 482, 509
—— *v.* London & N. W. Railway 400
—— *v.* The Ohio & Pennsylvania Railway 478

Page

Beman *v.* Rufford 13, 420, 494, 579
Bend *v.* Susquehanna Bridge Co. 7, 83
Benedict *v.* Coit 161
Benett *v.* Peninsular & Oriental Steamboat Co. 261
Bennett, *ex parte* 74, 605
—— *v.* Camden & Amboy Railway 470
—— *v.* Dutton 32, 242, 295, 345
—— *v.* Filyaw 284, 286, 321
—— *v.* Railway 140, 145
Benson, *ex parte* 457
—— *v.* The City of Albany 536
—— *v.* Heathorn 494
—— *v.* New York City 558
Bentinck *v.* Norfolk Estuary 191
Beverly *v.* Lincoln Gas-Light & Coke Co. 202, 423, 427
Bigelow *v.* Hartford Bridge 503
—— *v.* Heaton 317
—— *v.* Willson 627
Bill *v.* Darenth Valley Railway 429
Bingham *v.* Rogers 269, 276
—— *v.* Weiderwax 577
Binney's case 39
Bird *v.* Holbrook 331
—— *v.* W. & M. Railway 480, 481
Birge *v.* Gardiner 330, 331
Birkenhead, L. & C. J. Railway *v.* Pilcher 89, 90
Birkenhead, L. & Ch. R. *v.* Webster 81
Birkett *v.* Willan 273
Birmingham, Brist. & Thames J. R. Co. *v.* Locke 68, 73, 83, 632
Birmingham Canal Co. *v.* Lloyd 510
Birmingham & Oxford J. Railway Co. *v.* Regina 670
Bishop *v.* North 2
Bissell *v.* Price 308, 309, 314
Black *v.* Baxendale 234
—— *v.* Carrollton Railway 326, 345, 348
Blackwell *v.* Wiswall 379
Blake, adm'r, *v.* The Midland Railway 264, 337
Blake *v.* Ferris 378
—— *v* Rich 126, 344
Blakemore *v.* Bristol & Exeter Railw. 430
—— *v.* The Glamorganshire Canal Nav. 192, 449, 450, 451, 488, 512
Blanchard *v.* Isaacs 232
Bland *v.* Crowley 650, 659
Bligh *v.* Brent 38
Bliss *v.* Passumpsic Railway 172
—— *v.* Hosmer 120
Blodgett *v.* Morrill 69, 70
Blood *v.* Nashua & Lowell Railw. 182

Page

Bloodgood *v.* Mohawk & Hudson R. 112, 119, 140, 148, 150, 380, 517
Blossom *v.* Griffin 248
Blount *v.* Hipkins 55
Blundell *v.* Winsor 41
Boardman *v.* Gore et al. 49
Bodenham *v.* Bennett 272, 273
Bodington *v.* Great W. Railw. 485
Boehm *v.* Combe 247
Bogardus *v.* Rosendale Man. Co. 608
Boggs *v.* Martin 314
Bolckow *v.* Herne Bay Pier Co. 573
Bomar *v.* Maxwell 313
Bonaparte *v.* C. & A. Railway 6, 140, 148, 477, 540
Boner *v.* Merchants Steamboat Co. 318
Bonner *v.* State 465
Boody *v.* Rut. & Bur. Railw. 229, 230
Booker, *ex parte* 70
Bordentown & South Amboy Turnpike *v.* Camden & Amboy Railway 367
Bosanquet *v.* Shortridge 41
Bostock *v.* N. Staffordshire Railw. Co. 125
Boston, Concord & Montreal Railway *v.* State 549
Boston & Lowell Railway *v.* Boston & Maine Railway 436, 561
—— *v.* Salem & Lowell & other R. 131, 501, 503, 540, 548
Boston & Maine Railw. *v.* Babcock 108
Boston *v.* Bartlett 98, 109
Boston & Prov. R. *v.* Midland R. 149, 189, 191
Boston Type & Stereotype Foundery *v.* Spooner 9
Boston Water Power Co. *v.* Bos. & W. Railw. Co 129, 130, 166, 582
Bothlink *v.* Inglis 304
Boughton *v.* Carter 170
Boulton *v.* Crowther 161
Boulton, *ex parte v.* Skelehley 67
Bourne *v.* Freeth 604
Bowdoin College case 560
Bowen, *ex parte* 636
—— *v.* Lease 609
Bowlin *v.* Nye 320
Bowlby *v.* Bell 51
Bowman *v.* Hilton 314
—— *v.* Teall 233, 321
—— *v.* Wathen 168, 576, 587
Boyce *v.* Anderson 324
—— *v.* Chapman 321
Boynton *v.* Peterborough & Shirley Railway 148, 181
Boys *v.* Pink 299
Bracken *v.* William & Mary College 560
Bradford *v.* South C. Railway 284

Page

Bradley *v.* Boston & Maine Railway 393
—— *v.* Holdsworth 38
—— *v.* London & N. W. Railway Co. 690
—— *v.* New York & N. H. Railw. 6, 112, 117, 157, 161–561
—— *v.* Waterhouse 299
Bradshaw *in re* 146
Bradshaw & The E. & W. I. Docks & Birmingham Junction Railway 674
Bradshaw *v.* Rogers 113
Brainard *v.* Conn. River Railway 109, 160
Brainerd *v.* Clapp 127
Bramhall *v.* Lee 339
Brand *v.* Troy & Sch. Railway 330, 332
Brandt *v.* Bowlby 320
Braynton *v.* London & North W. Railway 190
Brenner *v.* Williams 324
Bretherton *v.* Wood 236, 261, 345
Brewster *v.* Hough 133, 527, 552
Bridge *v.* Grand Junction Railway 331, 354
Bridgeport *v.* The Housatonic Railway 533, 534
Bridges *v.* Wilts, Somerset & Wey. Railway Co. 679
Brig May Queen 319, 464
Briggs *v.* Ferrell 420, 576
—— *v.* Taylor 325, 333
—— *v.* Vanderbilt 350
Bright *v.* Hutton 637
—— *v.* North 495
Brightwell *v.* Mallory 39
Brinson *v.* Baker 279
Briscoe *v.* The Bank of the Commonwealth of Kentucky 134
Bristol *v.* Chicago & Aurora Railw. 526
—— *v.* Rensselaer & Saratoga Railway 309
Broadwell *v.* Butler 318, 319
Brocket *v.* Railway 192, 561
Brooke *v.* Pickwick 242, 261, 313
Brookville & G. Turnp. Co. *v.* McCarty 603
Brooks *v.* N. Y. & Erie Railw. 362, 375
Broughton *v.* Manchester Water Works 409
Brown *v.* Bellows 107
—— *v.* Byrne 52
—— *v.* Cayuga & Susquehanna Railway 157, 171, 435
—— *v.* Cincinnati 135
—— *v.* Eastern Railway 268
—— *v.* Hammond 560
—— *v.* Howard 600
—— *v.* Maxwell 386

Page
Brown *v.* Monmouthshire Railway & Canal Co 490, 597
—— *v.* Overbury 224
—— *v.* Prov. Warren, & Bristol Railway 143, 153
Brownell *v.* Flagler 331
Browning *v.* Camden & Woodbury Railway 477
Bruner *v.* Planters Bank 506
Bryan *v.* Lewis 45
Bryson *v.* Warwick & Birm. Canal Co. 632
Buck *v.* Squiers 159
Buckeridge *v.* Ingram 39
Buckfield Branch Railway *v.* Irish 73
Buckman *v.* Buckman 160
Buffalo *v.* Holloway 391
—— *v.* Webster 558
—— *v.* Corning & N. Y. Railway *v.* Pottle 96
—— & Niagara Falls Railway *v.* Buffalo 616
Bull *v.* Chapman 638
Buncombe T. Co. *v.* McCarson 9
Burgess *v.* Gray 379
Burkinshaw *v.* Bir. & Ox. J. Railway 671, 681
Burmester *v.* Norris 13
Burnes *v.* Pennell 61, 399
Burnett *v.* Lynch 47, 59
—— *v.* M'Biscoe 78
Burnside *v.* Steamboat Company 360
Burrell *v.* Jones 405
—— *v.* North 247
Burroughs *v.* Housatonic Railw. 359
Burt *v.* Caledonia County Grammar School 560
—— *v.* Farrar 7
Burton, *ex parte* 637
Burton *v.* Great Northern Railway 241
—— *v.* Philadelphia, &c. Railway 157, 365, 385, 394
—— *v.* Wilkinson 306
Bush *v.* Seabury 558
—— *v.* Steinman 378, 379
Buskirk *v.* Purington 316
Butcher *v.* London & Southwestern Railway 243
Butler *v.* Basing 237, 238
—— *v.* Heane 271
—— *v.* Hudson River Railw. 312
—— *v.* Pennsylvania 134
Butman *v.* Vermont Central Railw. Co. 155
Butt *v.* Great Western Railway 299
Butterfield *v.* Forrester 330, 331
Byran *v.* Lewis 45

C.

Page
C., C. & C. Railway *v.* Elliott 372
—— *v.* Keary 388
C. P. & Ind. Railw. *v.* Simpson 692–697
Cabot & West Springfield Bridge *v.* Chapin 79
Cahill *v.* Kalamazoo Ins. Co. 21
Calder *v.* Bull 548
Calder & Hebble Nav. Co. *v.* Pilling 24, 27
Caldwell *v.* Murphy 325, 351
Caledonian & Dumbartonshire Junc. Railway *v.* Helensburg Harbor 664
Caledonian Railway *v.* Ogilvy 176
—— *v.* Sprot 157
Callender *v.* Marsh 161
Cambridge & Somerville *v.* Charlestown Branch Railway 456
Camden & Amboy Railway *v.* Baldauf 267, 275
—— *v.* Belknap 243, 267
—— *v.* Briggs 117, 324, 356, 560
—— *v.* Burke 235, 236
Camden Bank *v.* Halls 49
Came *v* Brigham 608
Campbell *v.* London & Brighton Railway 592, 593
—— *v.* Mosier 372
—— *v.* Perkins 286
Canal Co. *v.* Archer 136
—— *v.* Blakemore 192
Canal Commissioners *v.* The People 160
Canandaigua & Niagara Railway *v.* Payne 135, 156
Canfield *v.* Northern Railw. Co. 308
Canning *v.* Williamstown 338
Cape Sable Company's case 39
Capper *v.* Lindsey (Earl of) 660
Carbern *v.* Campbell 692–697
Carden *v.* General Cemetery Company 462
Carey *v.* Berkshire Railway 338, 339
Carlisle *v.* Cahawba & Marion Railway Co. 78
—— *v.* Southeastern Railway 494, 598
Carlton *v.* Laighton 591
Carman *v.* Steubenville & Ind. Railway 152, 153, 379
Carmichael, *ex parte* 637
Carpenter *v.* County Commissioners of Bristol 141, 455, 456
—— *v.* N. Y. & N. H. Railw. 597, 598
Carpue *v.* London & Brighton Railway Co. 326
Carr *v.* Geo. Railway & Banking Co. 117, 128, 173
—— *v.* Lan. & Yorkshire Railway 277
—— *v.* Le Fevre 595, 609

Page

Carron *v.* Western Railway 157
Carrick's case 605
Carroll *v.* New York & New Haven Railway 332, 333
Case *v.* Thompson 148
Cass *v.* Dillon 533, 534
Catchpole *v.* Ambergate Railway 62
Catlin *v.* Harned 514
—— *v.* Hills 332
Cawley *v.* Furnell 244
Center *v.* Finney 331
Central Bridge Co. *v.* Bailey 586
—— *v.* City of Lowell 129
Central Plank R. *v.* Clemens 96
Central Railway & Banking Co. *v.* Davis 331
Central Turnpike Co. *v.* Valentine 37
Central Military T. Railw. *v.* Rockafellow 371, 375
Centre Turnpike Co. *v.* Smith 355
Chamberlaine *v.* Chester Railway 626
Champion *v.* Bostwick 285, 350
Champlain & St. Lawrence Railway *v.* Valentine 166
Champlin *v.* Pendleton 160
Chandler *v.* Broughton 385
Chapin *v.* Boston & Prov. Railway 142
—— *v.* Marlboro 351
—— *v.* Vermont & Mass. Railway 49
Chaplin *v.* Clarke 604
Chapman *v.* Albany & Sch. Railw. 157, 159, 160, 162
—— *v.* Atlantic & St. Lawrence Railway 360
—— *v.* Mad River & L. E. Railw. 79, 477, 486, 622
—— *v.* Warmer 591
Chapple's case 69, 90
Charitable Corporation *v.* Sutton 411
Charles River Bridge *v.* Warren Bridge 10, 131, 116, 134, 501, 539, 545, 553
Charles River Railway *v.* County Comm. of Norfolk 183
Charlestown Branch Railway *v.* Middlesex 148
Charlotte & C. Railw. *v.* Blakely 86
Chase *v.* New York Central Railw. 154
—— *v.* Washington Mut. Ins. Co. of Cincinnati 319
Chasemore *v.* Richards 171
Chateau *v.* Steamboat St. Anthony 237
Chatham *v.* Brainerd 160
Cheltenham & Great W. U. Railw. *v.* Daniel 47, 83, 632
—— *v.* De Medina 83
Cheney *v.* Boston & Maine Railway 32
Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio Railway 130

Page

Chesley *v.* Peirce 608
Chester Glass Co. *v.* Dewey 44, 71
Chestnut Hill Turnpike Co. *v.* Rutter 380, 517
Chevallier *v.* Patton 297
Chicago, Burlington & Quincy Railway *v.* Wilson 122, 456
Chicago & Mississippi Railway *v.* Patchin 127, 366, 371, 373
Chicago & Rock Island Railway *v.* Ward 370
—— *v.* Warren 256, 303
Child *v.* Coffin 44
—— *v.* Hudson Bay Co. 24, 25
Childs *v.* Som. & Ken. Railway 204, 229
Chilton *v.* London & Croydon Railway 25, 31
Chippendale *v.* The Lan. & Yorkshire Railway 277, 278
Chouteau Spring Co. *v.* Harris 43
Christie *v.* Griggs 323, 327
Church *v.* The Imperial Gas Light and Coke Co. 424, 427
C., H. & D. Railway *v.* Waterson 363
Cincinnati Coll. *v.* State 117
Cincinnati *v.* Evans 692–697
Cincinnati, Indiana, and Chicago Railway *v.* Clarkson 100
Cincinnati *v.* Presbyterian Church 692–697
Cinn., Wilm. & Zanesville Railway *v.* Com. of Cl. Co. 112, 533
Citizens Bank *v.* Nantucket Steamboat Co. 237, 248, 294
City of Louisville *a.* The University 560
City of Lowell *v.* Hadley 558
City of O. *v.* Clev. & Toledo Railway 597, 598
City of St. Louis *v.* Alexander 534
—— *v.* Russell 560
Claffin *v.* Wilcox 384
Clapp *v.* Hudson River Railway 346
Clarence R. *v.* Great North of England, Clarence & H. J. Railway, 105, 116, 482, 506
Clark *v.* Boston, Concord & Mont. Railway 172
—— *v.* Corporation of Washiogton 576
—— *v.* Dixon 692–697
—— *v.* Faxton 267, 275
—— *v.* The Guardians of the Cuckfield Union 425, 427, 428
—— *v.* Mayor of Syracuse 112
—— *v.* Needless 248
—— *v.* Spence 311
—— *v.* Syracuse & Utica Railway 363, 364, 372, 375

Page
Clark *v.* Vermont & Canada Railway 136, 373
Clark's case 24
Clarke, *ex parte* 637
—— *v.* City of Rochester 535
—— *v.* Dickinson 692–697
—— *v.* Gray 242
—— *v.* Imp. Gas Light Co. 406, 409
—— *v.* Leicestershire & Northamptonshire Union Canal 455, 459
—— *v.* Monongahela Nav. Co. 87
—— *v.* The Rochester Railway 373
Clarkson *v.* Hudson River Railway 147
Clay *v.* Rufford 400
—— *v.* Trott 533
Clayton *v.* Carey 465
—— *v.* Hunt 271
Clement *v.* Canfield 373, 420
Clements *v.* Bowes 604
—— *v.* Todd 605
Cleveland, Painesville Ash. Railw. *v.* City of Erie 438
Cleveland & Pittsburgh Railw. *v.* Ball 692–697
—— *v.* Kelley 229
Clipper (The) *v.* Logan 308
Clough *v.* Bond 594
Clunnes *v.* Pezzey 310
Coakley *v.* North Pennsylvania R. 348
Coates *v.* The City of New York 112, 556
Coats *v.* Clarence Railway 484, 512
Cockburn, *ex parte* 43
Cockerell *v.* Van Dieman's Land Co. 103
Coe *v.* Pennock, &c. Railway 591
Coffin *v.* Collins 11, 692–697
Coggs *v.* Barnard 328, 411
Cohen *v.* Frost 243
—— *v.* Gwinn 601
—— *v.* Wilkinson 489
Colcock *v.* Louisville Railway 205
Cole *v.* Goodwin 267, 276
Colegrove *v.* Harlaem & N. Y. and New Haven Railway 332
Coleman *v.* Southwick 346
Coles *v.* Bank of England 597
Collett *v.* London & Northwestern Railway 620
Collins *v.* Albany & Sch. Railway 330, 346
—— *v.* Blantern 408
—— *v.* Boston & Maine Railway 312, 313
—— *v.* Bristol & Exeter Railway 284
—— *v* Central Bank 574
—— *v.* South Staffordshire Railw. Co. 690
Page
Collinson *v.* Newcastle & Darlington Railway 181
Colman *v.* Eastern Counties Railw. 93, 94, 115, 401, 435, 652
Colt *v.* McMechen 233
Columbia Ins. Co. *v.* Wheelwright 468
Columbine *v.* Chichester et al. 56
Columbo (The) 308
Columbus, Piqua & Ind. Railway *v.* Ind. & Bellefontaine Railw. 421, 439
—— *v.* Simpson 136
Colvin *v.* The Turnpike Co. 94
Commercial Bank *v.* The State 560
Commissioners *v.* Jarvis 560
Commonwealth *v.* Alger 167
—— *v.* Arrison 465, 473
—— *v.* Boston & Maine Railway 145, 167, 674
—— *v.* Boston & Worcester Railw. 339
—— *v.* Canal Commis. 20
—— *v.* Clarkson 208, 209
—— *v.* Commercial Bank 472
—— *v.* Cullen 94, 559, 560
—— *v.* Erie & Northeast Railw. 117, 163, 193, 520
—— *v.* Fisher 150, 161
—— *v.* Fitchburg Railw. 193, 666
—— *v.* The German Society 465
—— *v.* Guardians of the Poor of Philadelphia 442
—— *v.* Mayor of Lancaster 77
—— *v.* Nashua & Lowell Railway 515, 520, 221
—— *v.* New Bedford Bridge 515, 520, 521
—— *v.* Penn. Benevolent Institution 465
—— *v.* Pittsburgh & Connellsville Railw. 502
—— *v.* The Philanthropic Society 465
—— *v.* Power 28, 29, 30, 236
—— *v.* Ritcher 114
—— *v.* Roxbury 692–697
—— *v.* St. Mary's Church 17
—— *v.* St. Patrick's Benevolent Society 465
—— *v.* Susquehanna R. 119, 150
—— *v.* Tenth Mass. Turnpike Co. 603
—— *v.* Tewksbury 112
—— *v.* The Union Fire & Marine Ins. Co. 465, 473
—— *v.* Vermont & Mass. Railway 520, 521
—— *v.* Worcester 558
Conant *v.* Van Schaick 608
Concord Railway *v.* Greely 135, 143, 144, 172
Conn. & Pass. River Railway *v.* Bailey 70, 73, 95, 98

Page

Conn. & Pass. Rivers R. *v.* Cooper 526
Conn. River Railw. *v.* Clapp. 138
Connop *v.* Levy 637
Conro *v.* Port Henry Iron Co. 17
Const *v.* Harris 496
Contocook Valley Railw. Co. *v.* Barker 79
Cook *v.* Champ. Transportation Co. 359
—— *v.* Parham 390
Cooke *v.* Oxley 78, 98, 99
Cooling, *in re* 178
Coon *v.* Syracuse & Utica Railway 386, 387
Cooper *v.* Berry 268, 269, 297
—— *v.* Kane 317
—— *v.* The Shropshire Union R. & C. Co. 624
Cope *v.* Cordova 252
—— *v.* Thames Haven Dock and Railway 425
Copes *v.* Charleston 535
Copper Miners Co. *v.* Fox 427, 428
Coppin *v.* Braithwaite 33
Corby *v.* Hill 692–697
Corey *v.* Buffalo, Corning & N. Y. Railway 163
Cork & Bandon Railw. *v.* Cazenove 89
—— *v.* Goode 90
Cork & Youghal Railw. *v.* Patterson 91, 624
Corning *v.* McCullough 608
Cornwall *v.* Sullivan Railway 375
Corpe *v.* Glyn 461
Corregal *v.* London and Blackwall Railway 456–461
Cort *v.* Ambergate, Nottingham, &c. Railway 205
Corwin *v.* New York & Erie Railw. 365
Cory *v.* Yarmouth & Norwich R. 500
Coster *v.* New J. Railway 127, 147
Costigan *v.* Mohawk & Hudson R. 415
Cother *v.* Midland Railway 190, 511
Cotterill *v.* Starkey 331
Cotton *v.* County Commissioners 534
Couch *v.* Steele 390
County *v.* Leidy 311
Covell *v.* Hitchcock 306, 692–697
Covington & Lexington R. *v.* Ingles 312
—— *v.* Kenton Co. Ct. 533, 560
Cox *v.* Midland Counties R. Co. 292
Coxe *v.* Heisley 262
Coy *v.* Utica & Sch. Railway 366, 367
C., P. & A. Railw. *v.* City of Erie 9
Craig *v.* The City of Vicksburg 596
Cram *v.* Bangor House 20
Crawford *v.* Chester & Holyhead Railway 191
Crawfordsville R. *v.* Wright 385
Crawshay *v.* Homfray 317

Page

Creed *v.* Lancaster Bank 38
Crewe *v.* Edleston 573
Crocker *v.* Crane 8, 9, 88, 146
—— *v.* New London, W. & P. Railway 34, 384
Croft *v.* Alison 381
—— *v.* Waterhouse 324
Cromford Canal Co. *v.* Cutts 178
—— & High Peak R. Co. *v.* Lacey 83,86
Cromford & High P. Railway *v.* S. D. & W. Railw. 647
Crosby *v.* Fitch 233
—— *v.* Hanover 123, 135
Cross *v.* Law 607
—— *v.* Mill Co. 74
Crosse *v.* Smith 469
Croton Turnpike *v.* Ryder 501, 582
Crouch *v.* Great North R. Co. 263, 285, 286, 321, 356
—— *v.* Great Western R. 317
—— *v.* London & N. W. R. 236, 279, 282, 300, 356
Cruger *v.* Hudson R. Railway 146
Culbertson *v.* Wabash Nav. Co. 625
Cumberland Marine R. *v.* Portland 528
Cumberland Valley R. Co. *v.* Baab 78, 653
—— *v.* Hughs 431
Cummings *v.* Prescott 22, 65
Cunliff *v.* Manchester and Bolton Canal Co. 13, 92, 497
Curran *v.* State of Arkansas 75, 560
Currier *v.* Lowell 391
Curtis *v.* Auber 591
—— *v.* Drinkwater 323
—— *v.* Harlow 608
—— *v.* Leavitt 408, 609
—— *v.* Roch. & Sy. R. 327, 345–347
—— *v.* Vt. Cent. Railway 141, 370
Cushman *v.* Smith 119, 137, 147
Cutbill *v.* Kingdom 16
Cuthbertson *v.* Parsons 244
Cutler *v.* Middlesex F. Co. 71

D.

Dale *v.* Hall 236, 246
Daley *v.* Norwich & Worcester Railw. 330
Dalton *v.* Midland Railway 63
—— *v.* Southeastern R. 692–697
Daly *v.* Thompson 633
Damont *v.* New O. & Carrollton Railway 336
Dana *v.* Bank of U. S. 17
Danbury & Norwalk Railway *v.* Wilson 72, 73, 89, 94, 95, 97
Dance *v.* Girdler 635, 644
Dand *v.* Kingscote 2

Page

Danforth *v.* Smith 685
Daniels *v.* Flower Brook Man. Co. 17
Danner *v.* South Carolina Railw. 364, 695
Danville Bridge Co. *v.* Pomeroy 228
Dart *v.* West 692–697
Dartmouth Coll. *v.* Woodward 5, 6, 11, 131, 537, 550, 558
Dater *v.* Troy Turnpike & Railway 380, 517
Dauchy *v.* Brown 43
Davey *v.* Mason 248, 297
David *v.* Moore 311
Davidson *v.* Boston & Maine Railway 113, 141, 148, 150, 168, 690
—— *v.* Graham 279
—— *v.* Gwynne 314
—— *v.* Seymour et al. 410
Davies *v.* Mann 263, 330
Davis *v.* Bank of England 597, 599
—— *v.* Cayuga & Susque. Railw. 313
—— *v.* Charles River Branch Railway 140, 141
—— *v.* Combermere 660
—— *v.* Lamoille Co. Plank Road Co. 431
—— *v.* London & Blackwall Railw. 174
—— *v.* Lowell Meeting-House 24
—— *v.* Willan 270
Dawson *v.* Kittle 317
—— *v.* Paver et al. 484
Dean *v.* Sullivan Railway 125, 126, 174, 372
Dearborn *v.* Boston, C. & Montreal Railway Co. 6, 136, 152
Deere *v.* Guest 480
Deering *v.* York & Cumberland Railway 480
Degge *v.* Midland Railway 387
De Grave *v.* Mayor of Monmouth 429
Delafield *v.* State of Illinois 595
Delaware Canal Co. *v.* Lampson 73
Del. & Atlantic Railway *v.* Irick 94, 97
Del. & Maryland Railway *v.* Stump 503
De Mott *v.* Laraway 259
Den *v.* Foy 560
Denny *v.* Trapnell 471
Denton *v.* Great Northern Railway 342, 343
—— *v.* Livingston 39
De Ruyter *v.* St. Peter's Church 586, 603, 609
Derwort *v.* Loomer 324
Devereux *v.* Kilkenny & G., S., & W. Railway 607
Devoe *v.* Penrose Ferry Bridge Co. 167
Dewers *v.* Pike 404
De Wint *v.* Wiltse 370

Page

Dibble *v.* Brown 311, 312
Dickinson *v.* Valpy 634
Dietrechsen *v.* Cabburn 512
Diggle *v.* The London & Blackwall Railway 203, 425, 428
Dill *v.* Railway Co. 242, 310, 312
Dimes *v.* Grand Junction Canal Co. 211
Dimick *v.* Brooks 145
Directors of the Poor *v.* Railway 141, 142
Dixon *v.* Baldwin 305
—— *v.* Ranken 388
Dobson, *ex parte* 49 *a*
Dodge *v.* County Commrs. of Essex 152, 153, 154
—— *v.* Woolsey 495, 532, 560
Dodson *v.* Wentworth 304, 305
Doe *v.* Beebe 113
—— *v.* Georgia Railway & Bridge Co. 151
—— *d.* Armistead *v.* N. Staff. Railway Co. 190, 670, 681
—— *d.* Banks *v.* Boot 572
—— *d.* Chandler *v.* Ford 592
—— *d.* Hudson *v.* Leeds & B. Railw. 677
—— *d.* Hutchinson *v.* Manch., Bury, & Rosendale Railway Co. 676
—— *d.* Jones *v.* Jones 593
—— *d.* Levy *v.* Horne 572, 592
—— *d.* Myatt *v.* St. Helen's Runcorn Gap Railway 572
—— *d.* Payne *v.* Bristol & Exeter Railway 190
—— *d.* Thompson *v.* Lediard 572
—— *d.* Watton *v.* Penfold 572, 592
Donalson *v.* Fuller 417
Donnaher *v.* The State 112, 519
Doo *v.* London & Croydon Railway Co. 646, 671
Dorr *v.* New Jersey Steam Nav. Co. 267, 269, 275
Doubleday *v.* Muskett 634
Doughty *v.* Somerville & Easton Railway 118, 140
Dovaston *v.* Payne 126, 160, 374
Dover & Deal Railway, *ex parte* Mowatt 636
Downer *v.* Bank of Zanesville 44
Doyle *v.* Kiser 313
Drake *v.* Hudson River Railw. 149, 159, 162, 519
Draper *v.* Gordon 56
—— *v* Williams 105
—— *v.* Worcester & Nashua Railway 311
Drew *v.* The New River Co. 391
Druid, case of the 383
Drybutter *v.* Bartholomew 39

Page

Dublin & W. Railway *v.* Black 89
Du Bois *v.* Delaware & Hudson Canal Co. 207, 208
Dubuque Co. *v.* Dubuque & Pacific Railway 534
Duff *v.* Budd 249, 272, 274
Duke *v.* Cahawba Nav. Co. 9
Duke of Leeds *v.* Earl of Amherst 510
Duke Norfolk *v.* Tennant 682
Duncan *v.* Chamberlayne 65
—— *v.* Hodges 49
—— *v.* Luntley 42
—— *v.* Railway Co. 388
—— *v.* Surrey Canal Co. 517
Duncuft *v.* Albrecht 39, 54, 55
Dundalk Western Railway *v.* Tapster 456
Dunham *v.* Trustees of Rochester 115
Dunn *v.* City of Charleston 172
—— *v.* North Missouri Railway 231
Dunstan *v.* The Imp. Gas L. Co. 202, 406
Durham & S. Railway Co. *v.* Walker 2
Durkee *v.* Vt. Central Railway 54
Dutchess Cotton Man. Co. *v.* Davis 72
Duvergier *v.* Fellows 41
Duxbury *v.* Vt. Central Railway 392
Dyer *v.* Jones 204
—— *v.* Tuscaloosa Bridge Co. 501
Dynen *v.* Leach 387, 695

E.

Eagle *v.* White 235
Eardley *v.* Law 607
Earle *v.* Hall 378
East Anglian Railway *v.* Eastern Counties Railway 94, 437, 649, 653, 661
—— *v.* Lythgoe 244
Eastburn *v.* Downes 514
East Hartford *v.* Hartford Bridge Co. 558
East India Co. *v.* Evans 311
—— *v.* Pullen 248
E. & W. India Docks & B. Junct. R. Co. *v.* Gattke 173, 175, 461, 485, 682
East Lancashire Railway *v.* Hattersley 223
—— *v.* L. & Yorkshire Railway 420
East London Water Works Co. *v.* Bailey 643
Eastern Archipelago Co. *v.* Reg. 603
Ex parte, The Eastern Counties Railway 293, 677
Eastern Counties Railw. *v.* Brown 33
Eastern Union Railw. *v.* Cochrane 623
—— *v.* Eastern Co. Railway 612

Page

Eastham *v.* Blackburn Railway 146
Easton Bank *v.* Commonwealth 533
—— Bridge *v.* Northampton 528
Eaton *v.* Whiting 585
Eden *v.* Lexington & Frankfort Railway 341
Edgerly *v.* Emerson 21
Edinburgh & Dundee Railway *v.* Leven 671
Edinburgh & G. Railway *v.* Stirling & D. Railway 435
Edinburgh, Leith & N. H. Railway *v.* Hibblewhite 73, 102
Edinburgh, Perth, & Dundee Railway *v.* Phillip 659, 666
Edmundson, *In re* 470
Edwards *v.* Grand Junct. Railway 639, 641, 655, 665
Edwards *v.* Great Western Railway 263, 356
—— *v.* Lowndes 461
—— *v.* Sheratt 262
—— *v.* Shrewsbury & Birm. Railway 490
—— *v.* Todd 314
—— *v.* Union Bank of Florida 381
Egbert *v.* Brooks 56
Ehrenzeller *v.* Union Canal Co. 560
Elder *v.* Bemis 378
Elderton *v.* Emmens 416
Eldridge *v.* Long I. Railway 334
Elkins *v.* Boston & Maine Railway 292, 322
Ellicottville Plank Road *v.* Buffalo Railway 160
Elliott, *In re* 689
—— *v.* South Devon Railway 669
Ellis *v.* Coleman 692–697
—— *v.* Eden 594
—— *v.* Essex Bridge Co. 44
—— *v.* Marshall 10, 92
—— *v.* Portsmouth & Raleigh Railway 321
—— *v.* Sheffield Gas Consumers' Co. 378, 379
—— *v.* Swanzey 159
Ellsworth *v.* Cole 46
—— *v.* Tartt 350
Elmore *v.* Naugatuck Railway 286, 288
Elwood *v.* Bullock 24
Elysville *v.* O'Kisco Co. 72
Embury *v.* Conner 105, 112
Enders *v.* Board of Public Works 577, 586
Enfield Toll B. Co. *v.* Conn. River Railway 117, 603
—— *v.* Hartford & N. H. Railway 130, 131, 132, 501, 540, 561, 588
Enthoven *v.* Hoyle 48

Page
Erie & Northeast Railw. *v.* Casey 127, 547, 606
Ernest *v.* Nichols 400
Erskine *v.* Townsend 585
Essex Bridge Co. *v.* Tuttle 72
Eton College *v.* Great W. Railway 483, 662
Etty *v.* Bridges 65
Eustace *v.* Parker 6
Evansville & Craw. R. *v.* Dick 692–697
Everhart *v.* West Chester & Ph. R. 84, 89, 95
Eward *v.* Lawrenceburgh & Upper Mis. Railway 386
Exeter & C. Railway *v.* Buller 492

F.

F. Street (matter of) 135
Fairchild *v.* Slocum 288
Fairtitle *v.* Gilbert 572
Falconer *v.* Campbell 10
Faley *v.* Hill 213
Falls *v.* Belfast & B. Railway 669
Farlow, *ex parte* 180
Farmers Bank of Md. *v.* Iglehart 44
Farmers Loan & Trust Co. *v.* Flushing R. 590
Farmers & Mechanics Bank *v.* Cham. Trans. Co. 236, 250, 252, 267, 268, 272, 280, 282, 283, 289, 294, 297
Farrar *v.* Stackpole 590
Farrish *v.* Reigle 324, 326, 348
Farrow *v.* Vansittart 2, 504
Farwell *v.* Boston & W. R. 386, 389
Faulkner *v.* Hebard 95, 565
—— *v.* Wright 233
Faunce *v.* Burke 201
Faviell *v.* The Eastern Counties R. 182
Fawcett *v.* Whitehouse 411
—— *v.* York & North Midland Railway 364, 554
Fay, Petitioner 576
Fay *v.* Steamer New World 279
Fearnley *v.* Morley 355
Feistal *v.* King's College, Cambridge 597
Felder *v.* Railroad Co. 384
Fellowes *v.* Deere 494
Fellows *v.* Com. & Railway Bank 609
Felton *v.* Deall 576
Fenton *v.* Trent & Mer. Nav. Co. 178, 461
Fenwick *v.* Bell 398
Feoffees of Heriot's Hospital *v.* Gibson 187
Ferguson *v.* Miners' and Manufacturing Bank 548
Ferris *v.* Van Buskirk 373
Fewings *v.* Tisdal 417
Ffooks *v.* London & Southwestern Railway 14, 510
Field *v.* Field 20
—— *v.* Vt. & Mass. Railway 140
Finlay *v.* Bristol & Exeter Railway 425
Finnie *v.* Glasgow & Southwestern Railway 264, 356
Finucane *v.* Small 299
First Bap. Church in Schenectady *v.* S. & T. Railway 519
—— *v.* The U. & Sch. Railway 519
First Mortgage Bondholders *v.* Maysville & Lexington Railway 590
Fischer *v.* Aide 353
Fish *v.* Chapman 267, 275
—— *v.* Dodge 379
Fisher *v.* Clisby 244
—— *v.* Evansville & Crawfordsville Railway 96, 622
—— *v.* Miss. & Tenn. Railw. 692–697
—— *v.* Price 46
Fishmongers Co. *v.* Robertson 424
Fitch *v.* Newberry 315, 316
—— *v.* Rutland & Burlington Railway 373
Fitchburg Railway *v.* Boston & Maine Railway 176
—— *v.* Charlestown Mutual Ins. Co. 360
Fitchburg & Wor. R. *v.* Hanna 315
Fitzpatrick *v.* New Albany & Salem Railway 391
Fitzsimmons *v.* Joslyn 272
Flagg, Comptroller and others, tax-payers, *v.* Lowber 413
Flamank, *ex parte* 104
Fletcher *v.* Auburn & Sy. R. Co. 150, 158, 160
—— *v.* Peck 529, 543, 545, 548
Fooks *v.* Wilts, Somerset & Weymouth Railway Co. 676
Foote *v.* City of Cincinnati 33
Ford *v* Monroe 341
Fort Edward, &c. Plank Road *v.* Payne 76
Forward *v.* Hamden & C. Canal Co. 130
—— *v.* Pittard 232, 233
Foss *v.* Harbottle 492, 493
Foster *v.* Birmingham & Dudley R. 499
—— *v.* Cumberland Valley R. 183
—— *v.* The Essex Bank 93, 381, 385
—— *v.* Oxford, W. & W. Railw. 22
Fowler *v.* Kennebec & Portland R. 202
Fowles *v.* Great Western Railway 279
Fox *v.* Clifton 604
—— *v.* McGregor 317
—— *v.* Northern Liberties 381
—— *v.* State of Ohio 113

Page
Franklin Ben. Association *v.* Commonwealth 465
Foy *v.* Troy & Boston R. 286
Franklin Bridge Co. *v.* Wood 3
Franklin *v.* Southeastern Railw. 692–697
Franklin Glass Co. *v.* White 71
Franklyn *v.* Lamond 49
Frederick *v.* Coxwell 49
Freedle *v.* N. Carolina Railw. 692–697
Freeman *v.* Newton 242
—— *v.* Winchester 72
Frink *v.* Potter 323, 324, 325, 326
Fripp *v.* The Chard Railway 574
—— *v.* Stratford Railway & Canal Co. 573
Fremont *v.* Coupland 285
Fuller *v.* Dame 411
—— *v.* Naugatuck Railway 235, 324, 328, 341
—— *v.* The Trustees of the Academic School in Plainfield 465
Furness *v.* Hudson River Railroad Co. 154, 174
—— Railw. Co. *v.* Smith 498
Fyler *v.* Fyler 65

G.

Gage *v.* Newmarket Railway Co. 651, 653, 654, 657
Galena & Chic. Railway Co. *v.* Fay 325, 330, 331
—— *v.* Loomis 394, 557
—— *v.* Yarwood 325, 326, 334, 345, 397
Galvanized Iron Co. *v.* Westoby 637
Gandell *v.* Pontigny 416
Gardiner *v.* Boston & Worcester Railway 162
Gardner *v.* Newburg 111, 148, 170, 477
—— *v.* State 530
Garris *v.* Ports. & Roanoke Railw. 363
Garside *v.* Trent & Mersey Nav. Co. 252, 255, 258, 260, 282, 286
Garwood *v.* Ede 605
Gatliffe *v.* Bourne 233
Gawthern *v.* Stockport, Disley, and W. Railway 165
Gayle *v.* Cahawba Railway 72
Gerhard *v.* Bates 62
Getty *v.* Hudson River Railway 167
Gibbon *v.* Paynton 274
Gibbs *v.* Trustees of Liverp. Docks 431
Gibson *v.* Culver 296
—— *v.* East India Co. 202
Giesy *v.* Cinn. Wilm. & Zanesville Railway 126, 136
Gifford *v.* New Jersey Railw. 492, 494
Gilbert *v.* Cooper 632
Gilbert *v.* Havermeyer 182
Giles *v.* Hutt 74
—— *v.* Taff Vale Railway 384
Gilford, Clark and others *v.* Smith Eldridge & Lee 306
Gillenwater *v.* Madison & Indiana Railway 326, 328, 390
Gillett *v.* Ellis 234
Gillet *v.* Moody 76
Gillingham *v.* Dempsey 320
Gillinwater *v.* Mississippi & A. Railway Co. 118
Gillshannon *v.* Stony Brook Railw. 387
Gilman *v.* Hall 204
Gilmore *v.* Bowden 311
Gilpin *v.* Howell 40
Girtman *v.* Central Railway 557
Gittings *v.* Mayhew 635
Gleason *v.* Briggs 393
Glover *v.* London & North W. Railway 384
—— *v.* North Staffordshire Railway Co. 115, 156, 682
—— *v.* N. W. Railway 517
—— *v.* Powell 167, 561
Goddard *v.* Hodges 637
—— *v.* Pratt 635
Goddin *v.* Crump 533
Gold *v.* Vermont Central Railway 145
Golden *v.* Manning 249
Gooday *v.* Colchester & Stour Valley Railway 639, 651, 662
Gooding *v.* Oliver 583
Goodman & Corwin *v.* Cin. & Chic. Railway 587
Goodman *v.* Pocock 415
Goodtitle *v.* Kibbe 113
Goodwin *v.* McGehee 605
—— *v.* Union Screw Co. 407
Gordon *v.* The Appeal Tax 527, 530, 552, 560
—— *v.* Baltimore 528
—— *v.* Cheltenham & Great W. Union Railway 482
—— *v.* Preston 575, 586
Gorgier *v.* Mieville 595
Goshen Turnpike Co. *v.* Hurtin 72
Gosling *v.* Birnie 306
Gouger *v.* Jolly 271
Gould *v.* Hill 267
—— *v.* Hudson River Railway 113, 163, 166
Governor & Co. of Copper Miners *v.* Fox 424, 426
Governor of British Plate Manuf. *v.* Meredith 161
Gowdy *v.* Lyon 308
Graby *v.* Camden & Amboy Railw. 311
Grace *v.* Morgan 346

Page

Graff *v.* City of Baltimore 151
Graham *v.* Birkenhead, Lancashire & Cheshire J. Railway 13, 489, 510
Graham & Co. *v.* Davis & Co. 276
Graham *v.* Ogle 49
Grand Gulf Railw. & Bank *v.* State 473
Grand Junc. Railway *v.* White 370
Grant *v.* Courten 536
—— *v.* Mechanics Bank of Philadelphia 44
Grantham Canal Co. *v.* Ambergate, &c. Railway 621
Gratz *v.* Redd 72
Grays *v.* Lynchb. & Salem Turnp. Co. 9
Gray *v.* Coffin 66
—— *v.* Hook 411
—— *v.* The Liverpool & Bury Railway Co. 105, 115, 488, 489
—— *v.* Monongahela Nav. Co. 92
—— *v.* Portland Bank 7
—— *v.* Turnpike Co. 72
Grayble *v.* York and Gettysburgh Turnpike Co. 87
Greathed *v.* Southwestern & Dorch. Railway 632
Great Barrington *v.* Berkshire Co. 528
Great North of England Railway *v.* Biddulph 64, 632
Great North of England, Clarence & Hartlepool Junc. Railway *v.* Clarence Railway 511, 686
Great Northern Railway, *ex parte* 678
Great Northern Railway *v.* Eastern Co. Railway 418, 419
—— *v.* Harrison 225, 328
—— *v.* Kennedy 73
—— *v.* Lancashire & Yorkshire Railway 510
—— *v.* Manch., Sheffield & Leeds Railway 499
—— *v.* Shepherd 312
—— *v.* South Yorkshire Railway 356
Great Western Railway *v.* Birmingham & Oxford Junction Railway et als. 421, 453, 504, 587, 659
—— *v.* Campbell 692–697
—— *v.* Goodman 33
—— *v.* Oxford, Worcester & Wolverhampton Railway 438, 510
—— *v.* Regina 454
—— *v.* Rushout 19, 421, 496
—— *v.* Thompson 371
Greene *v.* Dennis 3
Green *v.* Clark 322
—— *v.* The African Methodist Episcopal Society 465
—— *v.* Farmer 317
—— *v.* Miller 21

Page

Green *v.* Morris & Essex Railway 147
—— *v.* Murray 53
—— *v.* Seymour 10
—— *v.* Winter 56
Greenaway *v.* Adams 56
Greenhalgh *v.* M. & Birmingham Railway 509, 510
Greenville & Columbia Railway *v.* Cathcart 73
—— *v.* Coleman 94, 95
—— *v.* Nunamaker 138
—— *v.* Partlow 135
—— *v.* Smith 72
—— *v.* Woodsides 87
Greenwood *v.* Wilton Railway 141, 172
Grieff *v.* Switzer 320
Griffith *v.* Com. of Craw. Co. 534
Grinnell *v.* Trustees of Sand. Mans. & Newark Railway 587
Grizewood *v.* Blane 46
Grote *v.* Chester & Holyhead Railway 328
Groves *v.* The London & Brighton Railway 338
Guest *v.* Homfray 109

H.

Hadley *v.* Baxendale 263
Hagan *v.* Prov. & Worc. Railway 351
Hagerstown Turnpike Company *v.* Greeger 3
Hague *v.* Dandeson 598
Haight *v.* Morris Aqueduct 148
Hale *v.* Lawrence 559
—— *v.* Union Mutual Ins. Co. 380
Hall *v.* Chaffee 109
—— *v.* Cheney 245, 274
—— *v.* Conn. R. Steamboat Co. 324
—— *v.* Norfolk Estuary Co. 42, 53
—— *v.* Pickering 386
—— *v.* Power 28, 29
—— *v.* Selma & Tenn. Railway 87
—— et al. Trustees, &c. *v.* Sullivan Railway 578
—— *v.* U. S. Ins. Co. 44, 83
Hall *v.* Vt. & Mass. Railway 406, 494
Halstead *v.* Mayor, &c. of N. York 114
Hamilton Avenue (Matter of) 134, 539
Hamilton *v.* Annapolis & Elk Ridge Railway 129
—— *v.* Newcastle & Danville Railway 692–697
—— *v.* New York & Harlem Railway 162
Hamilton Plank Road *v.* Rice 94, 97
Hamlin *v.* Gt. Northern Railw. 321, 342
Hammon *v.* Southeastern Railway Co. 358

Page

Hand *v.* Baynes 320
Hannuic *v.* Goldner 45, 50
Harborough *v.* Shordlow 151
Harby *v.* E & W. India Dock & Birm. Railway 195
Harding *v.* Goodlet 105
Hare *v.* Grand Junc. Waterworks 497
—— *v.* Waring 51
Hargreaves *v.* Lancaster & Preston J. Railway 661
—— *v.* Parsons 39
Harlaem Canal Co. *v.* Siexas 73
Harmony *v.* Bingham 309, 318
Harrington *v.* du Chastel 411
Harris *v.* Costar 333
—— *v.* C. & W. Railway 265
—— *v* Rand 233
Harrisburg *v.* Craigle 149
Harrison *v.* Great Northern Railw. 225
—— *v.* Harrison 600
—— *v.* Heathorn 634
—— *v.* Lexington 106
Hart *v.* Baxendale 209
—— *v.* Eastern Union R. 573
—— *v.* Mayor, &c. of Albany 115
—— *v.* Rensselaer & Sara. R. 242
—— *v.* Western R. 360
Hartfield *v.* Roper 330
Hartford & New Haven R. *v.* Boorman 68, 84
—— *v.* Crosswell 91, 92
—— *v.* Kennedy 72
Hartley *v.* Harman 417
Hartsborn *v.* Johnson 317
Harvard Branch R. *v.* Rand 145
Harvey *v.* Lloyd 142, 535, 540
—— *v.* Thomas 535, 540, 679
Haslitt's Ex'rs *v.* Weatherspoon 638
Hastings *v.* Amherst & Belchertown Railway 473
—— *v.* Pepper 262, 307
Haswell *v.* Vt, Central R. 678
Hatch *v.* Vt. Central R. 115, 137, 156, 161, 170, 177
Haven *v.* Emery 577
Hawcroft *v.* Great Northern Railw. 342, 344
Hawkes *v.* Eastern Counties R. 647, 653, 654, 657
Hawkins, *ex parte* 685
Hawkins *v.* Hoffman 242, 312
Hawthorn *v.* Newcastle-upon-Tyne & North Shields R. 212, 591
Hay *v.* Cohoes Co. 152, 380
Hayden *v.* Cabot 392
—— *v.* Noyes 24
Hayes *v.* Monille 692–697
—— *v.* Western R. 386, 387
Hayne *v.* Beauchamp 8

Page

Haynes *v.* Thomas 164
Haynie *v.* Warring & Co. 237
Hays *v.* Riddle 317
Hayward *v.* Mayor of New York 128
Hazen *v.* Boston & Maine R. 121, 127, 386
Healey *v.* Story 404
Heanc *v.* Rogers 634
Hearn *v.* London & Southwestern Railway 279, 300
Heart *v.* State Bank 39, 44
Heathcote *v.* North Staffordshire R. 454, 505, 662
Heffner *v.* Commonwealth 457
Hegeman *v.* The Western R. 326, 327, 555
Heinecke *v.* Earle 305
Hemingway *v.* Fernandes 2
Hemphill *v.* Chenie 252
Henderson *v.* Australian Royal Mail Steam Nav. Co. 426
—— *v.* Mayor, &c. New Orleans 148
—— *v.* Railway 70, 438
Henderson & Nashville R. *v.* Leavell 78
Hennessy *v.* Farrell 202
Henning *v.* N. Y. & Erie R. 333
Henry *v.* Alleghany & Pittsburgh Bridge Co. 156, 161
—— *v.* Dubuque & Pacific R. 127, 143, 370, 372
—— *v.* Great Northern R. 492
—— *v.* Lloyd 674
—— *v.* Rutland & Burlington Railw. 406
—— *v.* Vermillion & Ashland R. Co. 69, 77, 86, 99
Hentz *v.* The Long Island R. 162, 511, 519
Herbein *v.* Railroad Co. 144
Herkimer M. & H. Co. *v.* Small 72
Herman *v.* Drinkwater 310
Herrick *v.* Randolph 552
—— *v.* Vt. Cent. R. 204, 208, 214, 220, 564
Herring *v.* Wil. & Ral. Railway 394
Hersey *v.* The Merrimac County Mutual Fire Ins. Co. 144
Hersfield *v.* Adams 241
Hertford *v.* Boore 109
Heseltine *v.* Liggers 564
Hester *v.* Memphis & Charleston R. 692–697
Hewitt *v.* Price 46
Hibbard *v.* New York & Erie Railway 32, 340
Hibblewhite *v.* M'Morine 45, 46, 48, 51
Hibernia Turn. Co. *v.* Henderson 86
Hichens *v.* Congreve 493
Hickok *v.* Plattsburgh 114
Higgins *v.* Livingston 405

Page
Highland Turn. Co. *v.* M'Kean 9, 37, 86, 87
Hightower *v.* Thornton 72, 76
Hilcoat *v.* Archbishop of C. & York 181
Hill *v.* Great Northern Railway 670
—— *v.* Manchester Waterworks 408, 573, 592
—— *v.* Higdon 692–697
Hill & Aldrich *v.* Mohawk & H. Railway 128, 137
Hilliard *v.* Goold 34, 35, 399
—— *v.* Richardson 378
Hilton *v.* Gerard 38
Hinton *v.* Dibbin 298
Hitchcock *v.* Giddings 61
Hitchins *v.* The Kilkenny & G. S. & W. Railway 607
Hobbitt *v.* London & N. W. Railw. 377
Hobson *v.* Trevor 591
Hochster *v.* De Latour 205
Hodges *v.* Croyden Canal Co. 573
—— *v.* Rut. & Bur. Railway 406
Hodgkinson *v.* Long Island Railway 520
Hodsoll *v.* Stallebrass 345
Hodson *v.* Davies 52
Hogg *v.* Zanesville Canal Co. 167
Holbrook *v.* Utica & Sch. Railway 326
Holcombe *v.* N. H. Del. Bridge Co. 21
Holford *v.* Adams 241
Holl *v.* Griffin 306
Hollenbeck, Adm'r, *v.* Berkshire R. 340
Hollister *v.* Nowlen 267, 324, 345
—— *v.* The Union Co. 157
Holmes, *ex parte* 468
—— *v.* Doane 352
—— *v.* Higgins 637
Holyoake *v.* Shrewsbury & Birmingham Railway 480
Homaday *v.* Ind. & Ill. Central R. 692–697
Homersham *v.* Wolverhampton Waterworks Co. 204, 425
Honner *v.* The Illinois Central Railway 387
Hood *v.* N. Y. & New Haven R. 282, 284, 288, 325, 343, 350
Hooker *v.* New H. & Northampton Co. 154, 157, 170
—— *v.* Utica & Minden Turnp. Co. 126
Hopkins *v.* At. & St. Lawrence R. 345
—— *v.* Prescott 411
Horn *v.* At. & St. Lawrence Railw. 362, 373
Horner's estate, *in re* 105
Horton *v.* Westminster Improvement Commissioners 408, 593
Hosking *v.* Phillips 678
Housatonic Railway *v.* Waterbury 363
—— *v.* Gage 465
Housatonic Railway *v.* Wilmington & Susquehanna Railway 201
Howden *v.* Simpson 645, 646
Howe *v.* Starkweather 39
Hoyt *v.* Mining Co. 575
Hubbard *v.* Russell 171
Hubgh *v.* N. Orleans & Carrollton Railway 340, 390
Huddersfield Canal Co. *v.* Buckley 73, 83, 84
Hudson *v.* Carman 9, 692–697
Hudson and Del. Canal Co. *v.* N. Y. & Erie Railway Co. 131, 478
Hudson River R. *v.* Outwater 150, 679
Hueston *v.* Eaton & H. Railway 175
Hughes *v.* Great Western Railw. 318
Hughs *v.* Providence & Worcester Railway 160, 197
Humble *v.* Langston 43, 47, 50, 55, 56, 57, 58, 59
—— *v.* Mitchell 39, 54
Humfrey *v.* Dale 52
Humphreys *v.* Reed 314
Hunt, Adm'r, *v.* Adams 49
Hunt *v.* Haskell 317
—— *v.* Shrewsbury and Chester R. 93
Hurd *v.* Rutland & Burlington Railway 372
Hurlburt *v.* Carter 609
Hutchins, Adm'r, *v.* State Bank 39
Hutchinson *v.* Granger 343
—— *v.* M. & B. & Rosendale Railway 679
—— *v.* York & Newcastle & Berwick Railway 378, 386
Hutton *v.* London and Southwestern Railway 104, 682
Hyatt *v.* Phil. & R. Railway 155, 349
Hyde *v.* Great Western Railway 476
—— *v.* Moffatt 353
—— *v.* Trent & Mersey Nav. Co. 233, 249, 257, 258

I.

Illidge *v.* Goodwin 330
Illingworth *v.* Manchester & Leeds Railway 509, 510
Illinois Central Railway *v.* County of McLean 528
—— *v.* Reedy 375, 397
—— *v.* Rucker 603
—— *v.* United States 113
Illinois & Mich. Canal *v.* Chicago & Rock I. Railway 134, 502
Ilott *v.* Wilkes 331
—— & Ebensburgh Turnpike Co. *v.* Phillips 92

Page

Indiana & Cinn. R. *v.* Caldwell 692–697
Indiana Central R. *v.* Hunter 136, 137
Indianapolis & Cen. R. *v.* Kinney 362, 374
Ingalls *v.* Bills 325, 334
Inge *v.* Birmingham, W. & S. V. Railway Co. 54
Inglis *v.* Great Northern Railw. 74, 407
Innocent *v.* The North Midland Railway 510
Insurance Co. *v.* Ind. & Cinn. Railw. 233
—— *v.* Smith 44
Irvine *v.* Turnpike Co. 92, 95, 130
Isham *v.* Bennington Iron Co. 40, 575
—— *v.* Granham 215

J.

Jackson *v.* Brown 586
—— *v.* Cocker 41, 55, 564
—— *v.* Lamphire 117
—— *v.* North Wales Railway 221
—— *v.* Rogers 261
—— *v.* Rut. & Bur. Railway 126, 362, 374, 551
Jacob *v.* City of Louisville 136
Jacobs *v.* Peterborough & Shirley Railway 108
Jacques *v.* Chambers 55, 65, 66
James *v.* Woodruff 63
Jameson *v.* Planters & Merchants Bank 538
—— *v.* Ware 228
James River & Kanhawa Co. *v.* Turner 135
Jarden *v.* Philadelphia W. & B. Railway 477, 479
Jarrett *v.* Kennedy 604, 636
Jencks *v.* Coleman 32, 236, 261, 345
Jenkin *v.* Row 581
Jenkins *v.* Biddulph 346
—— *v.* Union Turnpike Co. 86
Jenneson *v.* Camden & Amboy Railway 282
Jennings, *ex parte* 443
—— *in re*
—— *v.* Broughton 101
Jerome *v.* Ross 477
Jewett *v.* Stead 194
Joel *v.* Morrison 384
Johns *v.* Johns 40
Johnson, *ex parte* 400
—— *v.* Anderson 160
—— *v.* At. & St. Law. Railway 154
—— *v.* Bank of United States 49
—— *v.* Bentley 603
—— *v.* Midland Railway 294
—— *v.* Shrewsbury & B. R. 419, 499

Page

Johnson *v.* Stone 311, 313
Johnston *v.* S. W. R. R. Bank 8
Jones *v.* Boyce 334
Jones & Dow *v.* Bradley 229
—— *v.* Great Western Railw. 477, 504
—— *v.* Harrison 605
—— *v.* Pearle 317
—— *v.* Portsmouth & Concord R. 229
—— *v.* Rose 494
—— *v.* Voorhies 267, 313
—— *v.* Western Vermont Railway 235
Jordan *v.* Fall River Railway 243
Jorden *v.* Phil. Wil. & Baltimore Railw. 313
Josephs *v.* Pebrer 55
Jouitt *v.* Lewis 586
Jubb *v.* Hull Dock Co. 180, 470
Justices Clark Co. Ct. *v.* P., W. & S. R. Turnp. Co. 533

K.

Kartright *v.* Buffalo Commercial Bank 62
Kean *v.* Johnson 13, 495, 622
Keasy *v.* Louisville 137
Keegan *v.* Western Railway 387
Keith *v.* The Cheshire Railway 373
Kelly *v.* Mayor of New York 378
Kemp *v.* London & B. Railway 482, 671
Kennard *v.* Burton 394
Kennebec & Port. Railw. *v.* Kendall 73
—— *v.* Waters 70
Kennet Nav. Co. *v.* Witherington 173
Kennett's Petition 156
Kenrig *v.* Eggleson 274
Kent *v.* Great Western Railway 235
—— *v.* Hudson River Railway 318
—— *v.* New York Central Railway 417
Kentucky, Louisville, & Frankfort Railway *v.* Wilton 371
Keppell *v.* Bailey 2
Kerr *v.* Willan 270
Kerridge *v.* Hesse 634
Kerwhacher *v.* C. & Cincinnati Railway 372, 394
Kerwin, *ex parte* 49
Ketchum *v.* Catlin 565
Kidwell *v.* Baltimore & Ohio Railway 208, 209
Kidwelly Canal Co. *v.* Raby 97, 632
Kimball *v.* The Cocheco Railway 182
—— *v.* Kennebec & Portland Railw. 146
—— *v.* Riding 594
—— *v.* Rut. & Bur. Railway 267
—— *v.* Western Railw. 259
Kimble *v.* White W. Valley Railw. 173

Page
Kimmel *v.* Storer 494
King *v.* Boston & Worcester Railw. 387
—— *v.* Elliott 7, 37, 88
—— *v.* Lenox 237
—— *v.* Longworth 587
—— *v.* Richards 239, 316
—— *v.* Witham Nav. Co. 686
Kipp *v.* Finger 443
Kirk *v.* Bell 404
—— *v.* Guardians of the Bromley Union 204
Klein *v.* Alton & Sangamon R. 72, 87
Knight *v.* Abbot 362
—— *v.* Barber 39
—— *v.* Carrollton Railway 192
—— *v.* Fox 377
—— *v.* Ld. Plimouth 594
Knorr *v.* Germantown Railway 173
Knox *v.* Rives 262
Koch *v.* Dauphin 127
Kramer *v.* Ch. & Pittsb. Railw. 692–697
Kyle *v.* Auburn & Roch. Railw. 155, 368
—— *v.* Laurens Railw. 234, 284

L.

Lafayette Ins. Co. *v.* French 626
Lafayette & Ind. Railw. *v.* Shriner 362, 364, 374
Laing *v.* Colder 269, 276, 326, 327, 333
Lake *v.* Butler 194
—— *v.* Duke of Argyll 637
Lamert *v.* Heath 52
L'Amoreaux *v.* Gould 98
Lame *v.* Trone 154, 169
Lamprell *v.* Billericay Union 425, 427, 428
Lancashire & Yorkshire Railw. *v.* East. L. Railway 434
—— *v.* Evans 177, 682
Lancaster Canal Co. *v.* Parnaby 426
Lancaster & Carlisle Railway *v.* Maryport, &c. Railway 165
Landon *v.* Litchfield 552
Lane *v.* Bryant 351
—— *v.* Cotton 262, 294, 295
—— *v.* Newdigate 512
—— *v.* Smyth 595
Langford *v.* The Brighton L. & H. Railway 504
Langham *v.* Great Northern Railway 678, 682
Langlois *v.* Buffalo & Roch. Railw. 374, 387
Langton *v.* Horton 591
Langworthy *v.* New York & Harlem Railway 239
Lapham *v.* Green 239
Lauderbrun *v.* Duffy 154
Laugher *v.* Pointer 377, 379
Lawrence *v.* Great Northern Railway 154, 171, 177
—— *v.* Knowles 51
Lawrenceburgh & Upper Miss. Railway *v.* Montgomery 333
Lawton *v.* Fitchburg Railway 370
Leame *v.* Bray 384
Leavitt *v.* Towle 160
Lebanon *v.* Olcott 174
Lee *v.* Milner 450, 466, 489, 685
—— *v.* Monroe 511
—— *v.* Porter 510
—— *v.* Salter 314, 317
Leech *v.* Baldwin 262, 314
Leedom *v.* Plymouth Railway Co. 606
Leeds & Thirsk Railway *v.* Fearnley 89, 90
Leeson *v.* Holt 281
Legg *v.* Belfast & Bellamy Railway 182
Lehigh Nav. Co. *v.* Northampton County 528, 530
Lehigh Valley Railw. *v.* Lazarus 155
Leigh *v.* Hind 193
Lemmex *v.* Vermont Central R. 154
Leominster Canal Co. *v.* Shrewsbury & Hereford Railway 422
Lepford *v.* S. C. Railway 319
Lesher *v.* Wabash Nav. Co. 120, 123
Leviston *v.* Junction Railway 174
Levering *v.* Railroad Co. 119
Lewis *v.* Billings 632
—— *v.* Smith 637
—— *v.* Western Railway Corp. 259
Lewiston *v.* County Commissioners 121
Lexington & Big Sandy R. *v.* Goodman 570
Lexington & Ohio Railw. *v.* Applegate 162
—— *v.* Ormsby 108
Lexington & West Cambridge Railway *v.* Chandler 72, 74, 79, 86
Licktenheim *v.* Boston & Prov. Railway 256
Lickbarrow *v.* Mason 303
Liffred *v.* South Carolina Railway 234, 318
Lincoln *v.* Saratoga & Sch. Railway 142, 346, 347
Lincoln & Kennebec Bank *v.* Richardson 93
Lindsay (Earl of) *v.* Great Northern Railway Co. 661
Lindus *v.* Melrose 404
Linfield *v.* Old Colony Railw. 393, 435
Lister *v.* Lobley 149
Litt *v.* Cowley 304

Page

Little *v.* Newport, A. & H. Railw. 121, 190
Little Miami Railw. *v.* Collett 136
—— *v.* Noylor 137, 192
—— *v.* Stevens 388
Littleton Nav. Co. *v.* Parker 79
Livermore *v.* Jamaica 136
—— *v.* Livingston 478
Livingston *v.* Lynch et al. 92
—— *v.* Van Ingen 503, 545
Lloyd *v.* The Mayor of New York 384
Loder *v.* Kekule 54
Logan *v.* Courtown 86
—— *v.* Ponchartrain Railway 245
Londesborough, *ex parte* 636
London & Birm. &c. Railw. *in re* 494
London & Birm. Railw. *v.* Grand J. Canal Co. 175, 504, 686
London & Blackwall Railway *v.* Board of Works 147
—— *v.* Letts 178
London & Brighton R. *v.* Blake 476, 517
—— *v.* Cooper 483
—— *v.* Fairclough 45, 49, 73
London & Br. & S. C. R. *v.* Goodwin 623
London & Brighton Railw. Co. *v.* Wilson 85
London Dock Co. *v.* Knebel 660
—— *v.* Sinnott 429
London Grand Junction Railw. *v.* Freeman 68, 82, 564
—— *v.* Graham 68, 73, 83, 632
London & N. W. R. Co. *v.* Bradley 177, 682
—— *v.* Dunham 301
—— *v.* Lindsay 626
—— *v.* M'Michael 81
—— *v.* Smith 485, 682
—— *v.* Wetherall 518
London & S. W. R. *v.* South E. R. 419
London & South W. R. *v.* Stearns, *ex parte* 678
Long Island R. (Matter of) 18, 27, 68, 473, 478
Lord *v.* Copper Miners' Co. 493
—— *v.* Wormwood 374
Lord Petre *v.* Eastern Counties Railway Co. 483, 647, 665
Lorymer *v.* Smith 45
Louisville Railw. Co. *v.* Chappell 151
Louisville, Cincinnati & Charleston Railway *v.* Letson 11, 625
Louisville & Frankfort R. *v.* Wilton 363
Louisville & Nashville Railway *v.* Davidson Co. Ct. 533, 534
Louisville & North Br. Turnp. Co. *v.* Nashville & Ken. Turnp. Co. 192
Louisville & Portland Canal Co. *v.* Commonwealth 526

Page

Lovering *v.* Railway 128
Lovett *v.* Hobbs 261
Lowber *v.* City of New York 413
Lowe *v.* The London & N. W. Railway 227, 425
—— *v.* Moss 234
Lowell *v.* Boston & Lowell Railw. 378, 385, 392
Lowry *v.* The Com. & Farmers Bank of Baltimore 601
Lucas *v.* Birmingham & Gloucester Railway 303
—— *v.* New York Cen. Railway 339
Ludlow *v.* Hurd 591
—— *v.* N. York & Harlaem Railw. 106
Lumley *v.* Wagner 512
Lumsden *v.* Milwaukee 548
Lushington *v.* Sewell 590
Lyman *v.* Boston & W. Railw. 359, 560
—— *v.* White River Bridge Co. 517
Lynch *v.* Nurdin 330
Lyndsay *v.* Conn. & Passumpsic River Railway 366
Lyman *v.* Norwich University 396
Lyon *v.* Jerome 120, 148
Lythgoe *v.* East Anglian Railway 322

M.

Macedon & Bristol Plank Road Co. *v.* Lapham 94, 97
MacGregor *v.* Deal & Dover R. 94, 649, 654, 661
Machu *v.* The London & Southwestern Railway 293
Macomber *v.* Parker 591
Macon *v.* Macon & Western Railway 117
Macon, &c. R. R. Co. *v.* Davis 331, 365, 394
Macon & Western R. *v.* Holt 325
—— *v.* Parker 506, 622
—— *v.* Winn 331
Mactier *v.* Frith 479
Madison & Ind. R. *v.* Bacon 387
—— *v.* Whiteneck 560
Mad River & Lake Erie Railw. *v.* Barber 692–697
—— *v.* Fulton 311
Magellan Pirates 233
Mahon *v.* Utica & Schen. Railway 159
Mallory *v.* Burnett 284
Manchester & Lawrence R. *v.* Fisk 356
Manchester & Leeds R. *v.* Regina (in error) 199
Manchester, Sh. & L. R. *v.* Great Northern Railway 126
—— *v.* Wallis 362, 374

Page
Mangles *v.* Grand Collier Dock Company 68, 69, 86
Mann *v.* Boston & W. Railway 340
—— *v.* Cooke 68, 72, 99
—— *v.* Currie 68, 72, 83
—— *v.* Pentz 70, 72, 76, 84
Manning *v.* Com. under W. I. Dock Act 685
—— *v.* Eastern Counties Railway Company 553, 685
Manser *v.* The N. & E. R. Co. 174, 484
Mansfield & Sandusky R. *v.* Veeder 208
Mant *v.* Leith 594
March *v.* Concord & Ports. Railw. 170
Mare *v.* Malachy 477
Markham *v.* Brown 28, 345
Markwell, *ex parte* 637
Marlborough Man. Co. *v.* Smith 44, 400
Marquis of Salisbury *v.* Great Northern Railw. Co. 670
Marriage *v.* Eastern Cor. R. & L. & B. Railw. 669
Marsh *v.* New York & Erie Railw. 363
Marshall *v.* Baltimore & O. R. 411, 625
—— *v.* Stewart 389
—— *v.* Queenborough 409
—— *v.* York, Newcastle & Berwick Railway 245
Martin *v.* Great N. Railway 330
Mason *v.* Kennebec & P. R. Co. 141, 154, 173
Massachusetts Iron Co. *v.* Hooper 44
Massey *v.* Banner 294
Masterton *v.* Mayor of Brooklyn 205
Maudsley, *ex parte* 636
—— *v.* Manchester Canal Co. 489
Maund *v.* Monmouthshire Canal Co. 382
Maury *v.* Talmadge 324
Maving *v.* Todd 281
Mayall *v.* Boston & Maine R. 237
Maybin *v.* S. C. Railway 247
Mayhew *v.* Eames 271
—— *v.* Nelson 297
Mayor *v.* Randolph 161
Mayor of King's Lynn *v.* Pemberton 488
Mayor of Lichfield *v.* Simpson 174
Mayor of Ludlow *v.* Charlton 202, 424, 427
Mayor of Macon *v.* Macon & Western Railway 481
Mayor of New York *v.* Bailey 378
—— *v.* Furze 171
Mayor of Norwich *v.* Norfolk Railway 437, 656
Mayor, &c., of Rochester *v.* Curtis 477
Mayor of Savannah *v.* State 466
Mazetti *v.* N. Y. & Harl. R. 519
McArthur *v.* Kelly 477
—— *v.* Sears 233
McCall *v.* Brock 233
McCauly *v.* Givens 576
McClenagan *v.* Brock 325
McCormack *v.* Terre Haute & Richmond Railway 692–697
McCormick *v.* Lafayette 149
McCotter *v.* Hooker 308
McCready *v.* Holmes 308
—— *v.* The Railway Co. 359
McCulloch *v.* State of Maryland 526
McCullough *v.* Annapolis & Elk Ridge Railway 21, 550
McDaniel *v.* Robinson 317
McElroy *v.* Nashua & Lowell R. 325, 428
McEwen *v.* Woods 51
McGatrick *v.* Wason 389
McGill *v.* Rowand 262, 311
McGinity *v.* Mayor of New York 431
McGregor *v.* Official Manager of Dover, &c. Railway 437
McHenry *v.* Phila., Wilmington, &c. Railway 258
McIntire *v.* State 135
McIntosh *v.* Great Western Railw. 222
—— *v.* Midland Counties R. 215
McKenyon *v.* Shannon Railw. Co. 608
McKinney *v.* Neil 324, 335
McLaughlin *v.* Charlotte & S. C. R. 161, 172
McMahon *v.* Cincinnati Railway 136
McManus *v.* Carmichael 168
—— *v.* Lon. & York Railw. 278
McMasters *v.* Commonwealth 137
McMichael *v.* London & N. W. R. 90
McMillan *v.* Lee County 534
—— *v.* Maysville & Lexington Railway 73, 78
—— *v.* Saratoga & Wash. R. Co. 341, 374, 387, 390
McMillen *v.* Scott 56
McRea *v.* Russell 87
McRee *v.* Wilming. & Raleigh R. 131
Meacham *v.* Fitchburg R. 135, 140, 674
Mead *v.* Keeler 408, 409
Meason's Estate 39
Mechanics Bank of the City of N. Y. *v.* N. Y. & N. H. R. 569, 570, 595
Mechanics & Traders Bank *v.* Debolt 532, 551, 552, 560
—— *v.* Thomas 532, 560
Meeting-House Society in Lowell *v.* Lowell 530
Mellen *v.* Western Railway 170
Mellish *v.* Brooks 573
Mer. Mutual Ins. Co. *v.* Chase 284
Mercer *v.* McWilliams 149
—— *v.* Whall 138
Mercer County *v.* Pittsburgh & Erie Railway 229, 536

Page
Merriam v. Hartford & New Haven Railway Co. 246
Merrick v. Webster 309
Merrihew v. Milwaukie & Mississippi R. 34
Merrill v. Ithaca & Oswego Railw. 231
Merritt v. Northern Railway 105
Mersham v. Hobensack 233
Metcalfe v. Hetherington 431
—— v. London & Br. & So. Coast R. 692–697
Methodist Epis. Church v. Jacques 56
Mexborough (Earl of) v. Bower 511
Michigan Central Railw. v. Mich. So. R. 692–697
—— v. Ward 255
Micklethwait v. Winter 138
Middlesex Turnpike Cor. v. Lock. 92
—— v. Walker 92
—— v. Swann 71, 92
Middletown Bank v. Magill 44
Midland Counties Railway Co. v. Oswin 104, 685
Midland Great Western Railway v. Benson 309
Midland Great Western Railway Co. v. Gordon 68, 631, 633
Midland G. W. R. of Ireland v. Leech 623, 624
Midland Railw. v. Bromley 322
—— v. Daykin 362
Mifflin v. Harrisburg, Portsmouth M. & L. Railroad Co. 161
Miles v. Bough 407
—— v. Cattle 248, 263
Milhau v. Sharp 162
Mill Dam Co. v. Dane 94
Miller v. Auburn & Syracuse Railroad 106, 159
—— v. Illinois Central Railw. 56
—— v. New York & Erie Railw. 558
—— v. Steam Nav. Co. 319
Milligan v. Wedge 377
Milliman v. Osw. & Syracuse Railw. 557
Milner v. Field 224
Milnes v. Gerry 107, 223, 485
Milnor v. Geo. R. & Banking Co. 208
—— v. The New Jersey Railway 135, 167, 561
Milon & Rut. Plank Road Co. v. Husted 532
Milwaukie & Mis. Railw. v. Eble 137, 147, 370, 372
M. & M. Railw. v. Hodge 692–697
Mims v. Macon & W. Railway 674
Miner v. McWilliams 119
Miner's Bank v. United States 6
Minor v. Mechanics' Bank of Alexandria 7

Page
Minturn v. Seymour 479
Missouri & Ohio Railway v. State 602
Mitchell v. Crassweller 384
—— v. Newhall 52
—— v. Rome Railway 87, 91
Mitchel v. Rockland 692–697
—— v. Winslow 591
Mitchil v. Alestree 358
Mitford v. Mitford 591
M'Laughlin v. Pryor 385
M'Manus v. Crickett 381
Mobile & Cedar Point Railway v. Talman 574
Moers v. The City of Reading 533
Mohawk Bridge Co. v. The Utica & Sch. Railw. 131, 478, 501, 540
Mokawk & Hudson Railway 18
—— v. Artcher 478
—— v. Clute 526, 527
Money v. Macleod 411
Moneypenny v. Hartland 634
Monypenny v. Monypenny 660
Monkland & Kirkland R. v. Dixon 687
Monmouth Canal Co. v. Harford 3
Monongahela Nav. Co. v. Coons 114, 115, 156, 543, 560
Montgomery & West Point v. Varner 143
Montgomery & West Point Railw. v. Walton 480
Moody v. Wright 591
Moore v. Central Railway 331
—— v. Evans 267
—— v. Garwood 564
—— v. Hudson River Railw. 227, 229
—— v. Michigan Central Railw. 287
Moor v. Veasie 552
Moore's Ex. v. Patterson 317
Moorehead v. Little Miami Railw. 117, 192, 479, 561
Morgan v. Birnie 208
—— v. King 170
—— v. Milman 485
—— v. New York & Albany Railway 479, 608
Morris Canal & Banking Co. v. Fisher 595
—— v. Townsend 23
Morris v. Mechanics Bank 189
Morris & Essex Railw. v. Blair 165
Morris v. Newark 157, 162
Morrison v. Davis 233, 234
—— v. Steam Nav. Co. 494
Morse, Petitioner 138, 444, 457
—— v. Auburn & Sy. Railway 345, 385
—— v. Rut. & Burl. Railway 374
—— v. Slue 262
Morss v. Boston & Maine Railway 372, 553
Mortimer v. McCullon 46

Page
Morton *v.* Barrett 56
Morville *v.* Great Northern Railw. 279
Moses *v.* Boston & Maine Railway Co. 248, 255, 269, 311
Moss *v.* M'Cullough 608
Mozier *v.* Utica & Sch. Railway 366
—— *v.* Oakley 608
Mott *v.* Blackwall Railway 510
Mouchet *v.* Great W. Railway Co. 476, 480, 682
Mowatt, *ex parte* 636
—— *v.* Londesborough 636
Mozley *v.* Alston 22, 420, 492, 493
Mumma *v.* Potomac Co. 76
Munger *v.* Tonawanda Railw. 127, 128, 375
Munn *v.* Barnum 51
Munt *v.* Shrewsbury & Chester R. Co. 94, 497
Murch *v.* The Concord Railw. 420, 430
Murdock's Appeal 457
Murray *v.* De Rottenham 56
—— *v.* Railway Company 197, 333, 365, 398
—— *v.* South Carolina Railway 386
Muschamp *v.* Lancaster Railw. Co. 235, 282, 283, 285, 289
Mutual Savings Bank *v.* Meriden Agency Co. 409
Myers *v.* Myers 56
—— *v.* Perigal 38

N.

Napier, *ex parte* 467
Nash, *ex parte* 463
Nashville Railway *v.* Cowardin 123, 193, 562
Nashville & Chat. R. *v.* Messino 327, 328
—— *v.* Peacock 374
Nathan *v.* Whitlock 76
Natusch *v.* Irving et al. 92, 93
Naugatuck R. *v.* Waterbury Button Co. 288
Neal *v.* Gillett 330
Nelson *v.* Vermont & Canada Railway 419, 554
Nesbitt *v.* L. C. & C. Railway 205, 208
Nettles *v.* S. C. Railway Co. 234, 318
Neville *v.* Wilkinson 640, 663
Nevins *v.* Henderson 638
Nevitt *v.* Bank of Port Gibson 76
New Albany & Salem Railway *v.* Connelly 174, 481
—— *v.* Grooms 692–697
New Albany Railway *v.* Pickens 72
Newark Plank Road Co. *v.* Elmer 520
New Bedford Turnpike Co. *v.* Adams 71
Newburg & Cochecton Turnpike Co. *v.* Miller 501, 582
Newbury *v.* Conn. & Pas. River R. 392
Newburyport Bridge Co *v.* Story 71
Newburyport Turnpike Co. *v.* Eastern Railway Co. 478
Newcastle Railw. *v.* P. & J. Railw. 130
Newhall *v.* The Chicago & Galena Railway 479
N. H. Central Railw. *v.* Johnson 73, 79
N. J. Railway *v.* Kennard 325, 333
—— *v.* Suydam 139
N. J. Steamboat Co. *v.* Tiers 233
N. J. Steam Nav. Co. *v.* Merchants Bank 238, 240, 267, 268, 274, 294
Newland *v.* Paynter 591
New London *v.* Brainard 117
New Orleans, &c. Railway *v.* Harris 12, 560
New Orleans & Carrollton Railway *v.* Second Municipality of N. O. 192
New Orleans Op. & G. W. Railway *v.* Succession of John McDonough 533
Newry & Enniskillen R. *v.* Coombe 90
—— *v.* Edmonds 64
—— *v.* The Ulster Railway 613
Newry, W. & R. Railway *v.* Moss 69
Newstadt *v.* Adams 276
Newton *v.* Belcher 634
—— *v.* Bridgeport Turnpike Co. 44
—— *v.* Liddaird 634
New York Central Railway 128
—— *v.* Marvin 146
New York & Erie Railway *v.* Sabin 531, 532
—— *v.* Skinner 333, 364, 371, 372, 375
New York & N. H. Railroad *v.* Pixley 479
New York & Sharon Canal Co. *v.* Fulton Bank 622
New York Printing & Dyeing Establishment *v.* Fitch 479
Niagara Falls & Lake O. Railw. *v.* Hotchkiss 117
Nichol *v.* Nashville 533
Nicholson *v.* N. York & N. Haven Railway 139, 160, 162
—— *v.* Willan 266
Nicoll *v.* New York & Erie R. 127, 128
Nightingale's case 558
Nixon *v.* Brownslow 91
—— *v.* Taff Vale Railway 204, 213
Nockels *v.* Crosby 604
Nolin *v.* Mayor of Franklin 559
Nolton *v.* Western Railw. Corp. 328, 620
Norman *v.* London & Brighton R. 303
Norris *v.* Abington Academy 560
—— *v.* Androscoggin Railw. 367, 560
—— *v.* Smithville 605

Page

Norris *v.* The Irish Land Co. 65
—— *v.* Verm. Central Railw. 106, 199
Northam Bridge and Roads Co. *v.* The London & Southampt. R. 196, 504
North Amer. Col. Assoc. of Ireland *v.* Bentley 64
North British Railw. *v.* Horne 616
North British Railw. Co. *v.* Tod 186, 452
North Carolina Railw. *v.* Leach 692, 697
Northeast Railway *v.* Payne 192
Northwestern Railway *v.* Martin 213
—— *v.* Sineath 371, 372
Northern Railway *v.* Concord and Claremont Railway 112, 133
Northern Railway Co. *v.* Miller 72, 94
Northern Railway *v.* Page 32
Northern Ind. Railway *v.* Michigan Central Railway 625, 626
North Kent Railway *v.* Badger 235
North Staffordshire Railway Co. *v.* Landor 673
—— *v.* Wood 675
North Union Railway *v.* Bolton & Preston Railway 503
North W. Railway *v.* McMichael 89
Norton *v.* Volentine 171
Norwalk Plank Road *v.* Husted 532
Norway Plains *v.* Boston & M. Railway 252, 253, 254, 256
Norwich & Lowestoft Nav. Co. *v.* Theobold 38, 79
Norwich & Worcester Railway Co. *v.* Cahill 203, 292
Noyes *v.* Rutland & Burl. Railway 235, 250, 284, 289, 380, 429
—— *v.* Smith 390
—— *v.* Spalding 43, 46
Nugent *v.* Riley 585
Nulbrown *v.* Thornton 55
Nutting *v.* Conn. River Railway, 282, 283, 286

O.

Oakes *v.* Oakes 66
O'Brien *v.* Norwich & Worcester Railway 503
—— *v.* Philadelphia, Wilm. & B. Railway 394, 396
O'Connor *v.* Pittsburgh 161
—— *v.* Spaight 213
O'Donnell *v.* Bailey 552
Ogden *v.* Gibbons 167, 501, 503
—— *v.* Kip 479
Ogd., Ro. & Cl. Railway *v.* Frost 8, 72
Ogle *v.* Atkinson 306
O'Harra *v.* Lexington Railway 148
Ohio Life Insurance & Trust Co. *v.* Debolt 530, 532, 533, 560

Page

Ohio, &c. Railway Co. *v.* Ridge 6
Ohio & Penn. Railway *v.* Wallace 138
Oldfield *v.* New York & H. R. 339, 340
Old Town & Lincoln R. *v.* Veazie 80
O'Neal *v.* King 79
Opinion of the Judges, Matter of the Western Railway 528
Oppenheimer *v.* Edney 311
Orange Co. Bank *v.* Brown 248, 313
Orr *v.* Bank of U. S. 33
Osborn *v.* The Bank of the United States 92, 503
Ostrander *v.* Brown 252
Oswego Falls Bridge Co. *v.* Fish 117, 501
Ottawa Plank Road Co. *v.* Murray 575
Overmyer *v.* Williams 125
Overton *v.* Freeman 377
Owens *v.* Burnett 297
Owen *v.* Van Uster 405
Oxford Turnpike Co. *v.* Bunnell 44
Oxford, Worcester, & Wolverhampton R. *v.* South Staffordshire R. 125

P.

Pacific Railway *v.* Renshaw 94
—— *v.* Hughs 95
Pack *v.* Mayor of New York 341, 378
Packard *v.* Gitman 248
Paine *v.* Wright & The Ind. & B. Railway 525
Palmer *v.* Grand Junction Railway 235
—— (Matter of) *v.* Hungerford Market 180
—— *v.* Lawrence 72
—— *v.* Lorilard 315
Palmer Co. *v.* Ferrill 137
Pardee *v.* Drew 236, 312
Pardington *v.* South Wales Railw. 302
Pardoe *v.* Price 461, 573
Parker *v.* Adams 394
—— *v.* B. & Maine R. 141, 142, 155, 691
—— *v.* Bristol & Exeter R. Co. 355
—— *v.* The Dun Nav. Co. 496
—— *v.* Great Western R. 235, 263, 355, 356
—— *v.* Perkins 108
—— *v.* Rensselaer & Sar. R. 419
—— *v.* Scogin 534
Parkes, *ex parte* 466
—— *v.* Great Western R. 210
—— *v.* City of Boston 136, 181
Parmalee *v.* Oswego & S. R. 603, 674
Parnoby *v.* Lancaster Cond. Co. 431
Parrott *v.* C., H. & D. R. 520
—— *v.* Eyre 405
Parsons *v.* Gingell 294, 295
—— *v.* Hardy 233, 318

Page
Parsons *v.* Howe 692–697
—— *v.* London & Croydon R. 593
—— *v.* Monteith 267, 275, 319
Paterson *v.* Gandasequi 239
Patterson *v.* Wallace 333
Pauling *v.* London & N. W. R. 227
Paxson *v.* Swett 558
Paxton *v.* Popham 408
Peachey *v.* Rowland 377
Pearce *v.* Wycombe R. 189
Peavey *v.* Calais R. 116, 168
Pendergrast *v.* Turton 102
Penn *v.* McWilliams 533
Penn. Canal Comm. *v.* Penn. R. 531
Penn. Railway *v.* Heister 146
—— *v.* Keiffer 145
—— *v.* McCloskey 146, 276, 332, 339
—— *v.* McClure 146
—— *v.* Riley 146
Penobscot R. *v.* Dummer 73, 79, 80
—— *v.* White 79, 80, 692–697
Penobscot & Kennebec R. *v.* Dunn 70, 73, 80
People *v.* Beebe 443
—— *v.* Benton 207
—— *v.* City of St. Louis 167
—— *v.* Collins 457
—— *v.* Columbia C. P. 457
—— *v.* Comm. of Hudson 443
—— *v.* Corp. of N. Y. 456, 465
—— *v.* Everett 443
—— *v.* First Judge of Columbia 145
—— *v.* Hayden 150
—— *v.* Manhattan Co. 560
—— *v.* Mayor of Brooklyn 112, 136, 137, 525, 533
—— *v.* Michigan Southern R. 150, 692–697
—— *v.* Rensselaer & Sar. R. 167
—— *v.* Supervisors of Niagara 525
—— *v.* Supervisors of W. Chester 466, 560
—— *v.* Thompson 465, 473
—— *v.* Throop 443
—— *v.* White 126, 127, 135
Peoria & O. Railw. *v.* Etting 74, 95
Perine *v.* Dunn 510
—— *v.* Swain 514
Perkins *v.* Eastern R. and B. & M. R. 362, 375
—— *v.* Hart 417
—— *v.* Pritchard 573
Perren *v.* Monmouthshire R. & Canal Co. 353
—— *v.* Fireman's Ins. Co. 598
Perrine *v.* Ches. & Del. Canal Co. 117, 562
Perry *v.* Marsh 390
Peter *v.* Kendall 579
Peters *v.* Iron Mountain R. 417, 560
—— *v.* Ryland 329
Phelps *v.* Lyle 22
Phene *v.* Gillan 57
Philadelphia, Germantown, & Norristown R. *v.* Wilt 33, 381, 383
Philadelphia & Reading R. *v.* Derby 293, 328, 380, 383
—— *v.* Yeizer 150, 154, 155
Philadelphia & Trenton R. 115, 156, 159
Philadelphia & West Ch. R. *v.* Hickman 87, 99
Philadelphia & Wil. R. *v.* State of Maryland 531
Philadelphia, Wilm. & Balt. R. *v.* Cowell 100, 598
—— *v.* Bayless 528, 531
—— *v.* Howard 213, 370, 429, 624
—— *v.* Trimble 141, 370
Phillips *v.* Clark 302
—— *v.* Earle 248
—— *v.* Veazie 392
Phillips et al. *v.* Winston 591
Pianciani *v.* London & S. W. R. 300
Pickford *v.* Grand Junction R. 235, 242, 261, 263, 349
Pier *v.* Finch 32
Pierce *v.* Emery 577, 580, 588, 591
—— *v.* Somersworth 540
Piggott *v.* Eastern Counties Railway Co. 357
Pingry *v.* Washburn 538
Pinkett *v.* Wright 67
Piscataqua Bridge *v.* N. Hamp. Bridge 133, 540, 545
Pitchford *v.* Davis 604
Pittsburgh *v.* Scott 150
Pittsburgh & Steuben Railway *v.* Hall 142
Pittsburgh & Steubenville Railw. *v.* Clark 44
Pittsfield & North Adams Railway *v.* Foster 140, 147
Planché *v.* Colburn 205, 416
Plank Road *v.* Buf. & P. Railway 126, 149
Plank *v.* Payne 72
Plant *v.* L. I. Railw. Co. 156, 159, 161
Planters' Bank *v.* Merchants' Bank 39
—— *v.* Sharp, and Baldwin *v.* Payne 538
Plate Glass Insurance *v.* Sunley 85
Platt *v.* Hibbard 248
Playfair *v.* Birmingham, Bristol, and Thames J. Railway 498
Plum *v.* City of Newark 161
Pollard *v.* Hagan 113
—— *v.* Maddox 576

Page
Pollock *v.* The National Bank 601
—— *v.* Staples 51
Polly *v.* S. & W. Railway Co. 119
Pontchartrain Railway *v.* Lafayette and Pont. Railway 193
—— *v.* New Orleans & Car. & Lake P. Railway 547
Pontet *v.* Basingstoke Canal Co. 573
Poor *v.* Carleton 479
Porcher *v.* Gardner 653
Porter *v.* Androscoggin & Kennebec Railway 429
—— *v.* Buckfield Branch Railw. 206
Port of London Assurance Company's Case 18
Portland, Saco & Portsmouth Railway *v.* Graham 74, 86
Portman *v.* Nichol 692–697
Portzman *v.* Indiana & Cin. Railway 692–697
Pothonier *v.* Dawson 317
Pott *v.* Flather 54
Potts *v.* The Thames Haven Dock Railw. Co. 660
Povey *v.* Brown 591
Powell *v.* Evans 594
—— *v.* Mills 295
—— *v.* Myers 242, 243, 267
—— *v.* Wright 583
Powles *v.* Page 400
Poynder *v.* Great N. Railway Co. 120, 678, 679
Pozzi *v* Shipton 236
Presbyterian Brick Churchyard *v.* City of New York 556
Presbyterian Society of Waterloo *v.* Auburn & Roch. R. 160
Preston *v.* Eastern Counties Railw. 171
—— *v.* Grand Collier Dock Company 69, 494
—— *v.* Liverpool, Manchester & Newcastle-upon-Tyne Junction Railway Co. 639, 654, 659, 666
Price *v.* Great Western Railway 573
—— *v.* Powell 252, 308, 398
—— *v.* Price 39
Prichard *v.* La Crosse & Milwaukie Railway 365
Priestly *v.* Foulds 198
—— *v.* Fowler 386, 389
Priestley *v.* M. & Leeds Railw. Co 174, 687
Propeller Cleveland 321
Proprietors of Locks & Canals *v.* Nashua & Lowell Railway 141, 179
Providence Bank *v.* Billings & Pittman 117, 528, 551, 553, 560
Providence & Worcester Railway *v.* Wright 526
Pudor *v.* Boston & Maine Railway 311
Pulsford *v.* Richards 100, 101

Q.

Quarman *v.* Burnett 377, 379
Quimby *v.* Vermont Cent. Railway 333, 369, 371, 396, 397, 553
Quincy Canal *v.* Newcomb 160
Quiner *v.* Marblehead Ins. Co. 43

R.

Radcliff *v.* Mayor of Brooklyn 156, 163, 171
Railroad *v.* Berks Co. *et vice versa* 528, 530
—— *v.* Boyer 142
—— *v.* Bucher 141
Railroad Company, *ex parte* 160
—— *v.* Aspell 325, 335
—— *v.* Johnson 145
—— *v.* Skinner 364, 371
Railroad *v.* Davis 126
—— *v.* Roderigues 70, 74, 97
Railway *v.* Gilson 136
—— *v.* Legarde 136
—— *v.* Norton 395
Railsback *v.* Liberty and Abington Turnpike Co. 9, 95
Railstone *v.* York, N. & B. Railw. Co. 681
Raleigh & Gaston Railway Co. *v.* Davis 6, 151
Ramsden *v.* Manchester & S. J. & A. Railway 147, 159, 668
Ramsdall *v.* Craighill 479
Rand *v.* Townsend 686
Randall *v.* Cheshire Turnpike Co. 430
—— *v.* Roper 692–697
Randleson *v.* Murray 379
Ranger *v.* Great Western Railway 190, 200, 207, 210, 217
Ranken *v.* East & W. India Docks 678
Ranney *v.* The Huntress 247
Ransford *v.* Bosanquet 607
Ransome *v.* Eastern Co. Railway 265
Raphael *v.* Pickford 318
Rapsom *v.* Cubitt 377
Rastrick *v.* Derbyshire, Staff. and Worcestershire Railway 608
Rathbun *v.* Payne 330
Rathbone *v.* Tioga Navigation Co. 106, 125, 203
Rawson *v.* Johnson 261
Ex parte Reaveley 90
Redmond *v.* Dickerson 410

Page
Reedie *v.* London & North W. Railway 377, 379
Regina *v.* Abrahams 464
—— *v.* Ambergate, &c. R. Co. 452, 458
—— *v.* Baldwin 459
—— *v.* Beecham 521
—— *v.* Bingham 466
—— *v.* Birmingham & Gloucester Railway 199, 380, 455, 458, 459, 515
—— *v.* Birmingham & Oxford Railway 445
—— *v.* B. & Ox. Junction Railway Co. 670
—— *v.* Boult 521
—— *v.* Boulton 521
—— *v.* Bowring 522
—— *v.* Bristol Dock Co. 455, 467
—— *v.* Bristol & Exeter R. 442, 462, 469, 470
—— *v.* The Blackwall Railway 466
—— *v.* The Caledonian R. 190, 452, 455, 460
—— *v.* Comm. of Norfolk Co. 421
—— *v.* Comm. of Woods & Forests 454, 672
—— *v.* Cottle 669
—— *v.* Dean & Chapter of Chester 457
—— *v.* Dean & Chapter of Rochester 457
—— *v.* Deptford Pier & Improvement Co. 460
—— *v.* Derbyshire, S. & W. R. 443, 608
—— *v.* Dixon 469
—— *v.* East Anglian R. 444
—— *v.* East Lancashire R. 443
—— *v.* E. & W. I. Docks & Birm. J. R. 195, 196, 460
—— *v.* Eastern Counties R. 115, 157, 176, 199, 442, 443, 444, 452, 455, 489, 684
—— *v.* Ely 198
—— *v.* Fall 444
—— *v.* Frere 31
—— *v.* Gamble & Bird 467
—— *v.* Gen. Cemetery Co. 63
—— *v.* Grand J. R. 525, 615
—— *v.* Gt. North of Eng. R. 382, 515, 517
—— *v.* Great Western R. 442, 453, 458, 525
—— *v.* Greene 444
—— *v.* Grimshaw 19
—— *v.* Hopkins 443
—— *v.* Hull & Selby R. 461
—— *v.* Jones 443
—— *v.* Justices of Middlesex 444
—— *v.* Justices of Warwickshire 443
—— *v.* Pedley 379
Page
Regina *v.* Lancashire & Preston Railw. 470
—— *v.* Lancashire & Yorkshire R. 446, 453, 458, 466
—— *v.* Ledgard *et als.* & Mayor, &c. of Poole 442
—— *v.* Leeds & Liverpool Canal Co. 466
—— *v.* Liverpool, M. & N. R. 62, 466
—— *v.* London & Birm. R. 199, 455
—— *v.* London & Blackw. R. 444
—— *v.* London & Br. & South Coast R. 524
—— *v.* Londonderry & Coleraine R. Co. 64, 464
—— *v.* Lond. & Greenwich R. 667, 668
—— *v.* London & N. W. R. 458, 466, 683
—— *v.* London & Southampton R. 181, 518
—— *v.* London & Southw. R. 523, 615, 668
—— *v.* Manchester & Leeds R. 442, 455, 467, 468, 471, 673
—— *v.* Man., South J. & A. R. 524
—— *v.* Mayor of Bridgenorth 444
—— *v.* Mayor of Cambridge 444, 459
—— *v.* Mayor, &c. of Chester 457
—— *v.* Mayor of Dartmouth 444
—— *v.* Mayor of Poole 459
—— *v.* Mayor of Stamford 462
—— *v.* Mayor & Assessors of Rochester 457
—— *v.* Metropolitan Co. Sewers 683
—— *v.* Midland R. 525
—— *v.* Mile End Old Town 524
—— *v.* Musson 166
—— *v.* Newcastle-upon-Tyne 455
—— *v.* Newmarket R. 525
—— *v.* North Midland R. 178, 461
—— *v.* North Union R. 178, 442
—— *v.* Norwich 442
—— *v.* Norwich & Brandon R. 440, 441
—— *v.* Payn 459
—— *v.* Pickles 443
—— *v.* Rigby 199, 515
—— *v.* Rochdale & Halifax 466
—— *v.* Saffron 194
—— *v.* Scott *et al.* 515
—— *v.* Sharpe 199
—— *v.* Sheffield, A. & M. R. 470, 471
—— *v.* Sheriff of Middlesex 667
—— *v.* Sheriff of Warwickshire 456
—— *v.* South-Eastern R. 179, 197, 525
—— *v.* South Holland Drainage 471, 672
—— *v.* South Wales R. 125
—— *v.* St. Margaret's Leicester 459
—— *v.* St. Peter's College 444

Page
Regina *v.* St. Saviour, Southwark Ch. Wardens 444
—— *v.* Thames & Isis Comm. 444
—— *v.* Thorpe 518
—— *v.* Townsend 466
—— *v.* Trustees of Balby & Worksop Turnpike 461
—— *v.* Trustees of Louton Roads 454
—— *v.* Trustees of Swansea Harbor 672
—— *v.* Victoria Park Co. 75, 461, 467
—— *v.* Waterford & L. R. 122
—— *v.* Wilson 465
—— *v.* Wing 43
—— *v.* Worcestershire & Stafford R. 464
—— *v.* York, Newcastle & Berwick R. 458
—— *v.* York & North Midland Railw. 369, 452, 454, 458, 460
Reitenbaugh *v.* Chester Valley R. 118, 136, 137, 138
Relf *v.* Rapp 262
Reno *v.* Hogan 267, 273
Rensselaer & Sar. R. (In the matter of the) 371, 372
Reuter *v.* Electric Telegraph Company 429
Renthorp *v.* Bang 126
Revere *v.* Boston Copper Co. 12, 92
Rex *v.* Allgood 463
—— *v.* Amory 10, 537
—— *v.* Archb. of Canterbury 440, 457
—— *v.* Bagshaw 672
—— *v.* Bank of England 456, 463
—— *v.* Barker 440
—— *v.* Bishop of Chester 441
—— *v.* Bishop of Ely 457, 464
—— *v.* Bishop of London 441
—— *v.* Brecknock & Abergavenny Canal Navigation 441
—— *v.* Breton 464, 473
—— *v.* Bristol Dock Company 178
—— *v.* Chester 442
—— *v.* Chipping-Norton 38
—— *v.* Church Wardens of Taunton 442
—— *v.* Cola St. Andrews 21
—— *v.* Commissioners of the C. Inclosure 466
—— *v.* Com. of Dean Inclosure 441
—— *v.* Commissioners of London Dock Act 685
—— *v.* Comm. of Manchester 671
—— *v.* Comm. of the Nene Outfall 178
—— *v.* Coopers of Newcastle-upon-Tyne 443
—— *v.* Doncaster 16
—— *v.* Fell 470
—— *v.* Faversham 16
Rex *v.* Gardner 516
—— *v* Dr. Gower 456
—— *v.* Gray's Inn 464
—— *v.* Great Marlow 21
—— *v.* Guardians of Thame 442
—— *v.* Hertford 464
—— *v.* Highmore 473
—— *v.* Hostmen in Newcastle-upon-Tyne 463
—— *v.* Hungerford Market Co. 180, 461, 671
—— *v.* The Inhabit. of Barnes 524
—— *v.* Inhab. of the Co. of Kent 198
—— *v.* Inhabitants of the parts of Lindsey in Lincolnshire 198
—— *v.* Inhabitants of Pennegoes & Town of Mackynlleth 469
—— *v.* Inhabitants of St. Nicholas 590
—— *v.* Jeyes 441
—— *v.* Justices of Kent 470
—— *v.* The Justices of the City of York 456
—— *v.* The Justices of West Riding of Yorkshire 456, 469
—— *v.* Kerrison 198
—— *v.* Kingston 442
—— *v.* Kingswinford 524
—— *v.* Kirke 444
—— *v.* Langhorn 16, 19
—— *v.* Leeds & Selby Railway 178
—— *v.* Lincoln's Inn 464
—— *v.* Liverpool & Manch. Railw. 180
—— *v.* London Assurance Co. 463
—— *v.* London Dock Co. 178
—— *v.* Marquis of Stafford 461
—— *v.* Martin 9
—— *v.* May 16
—— *v.* Mayor of Cambridge 459
—— *v.* Mayor of Colchester 464
—— *v.* Mayor Liverpool 516, 672
—— *v.* Mayor, &c. of Stratford-upon-Avon 516
—— *v.* Mayor of York 442, 459
—— *v.* Medley 386
—— *v.* Merchant Tailors' Co. 463
—— *v.* M'Kay 473
—— *v.* Montacute 442
—— *v.* Morris 199, 517
—— *v.* Mott 50
—— *v.* Mousley 473
—— *v.* Newcastle-upon-Tyne 455
—— *v.* Northleach & Witney Roads 441
—— *v.* Nottingham Old Waterworks 456, 460, 686
—— *v.* Ouse Bank Commissioners 459
—— *v.* Pagham 161
—— *v.* Passmore 10, 537
—— *v.* Pease 517
—— *v.* Pedley 379

Page
Rex *v.* Proprietors of the Birmingham Canal 451
—— *v.* Round 459
—— *v.* Russell 517
—— *v.* Saunders 470
—— *v.* Severn & Wye R. 3, 441, 467, 615
—— *v.* Shelley 463
—— *v.* Sir William Lowther 473
—— *v.* St. Catherine's Hall 464
—— *v.* St. Catherine's Dock Co. 461
—— *v.* St. Pancras 459
—— *v.* Stainforth & Keadby Canal Co. 466
—— *v.* Tappenden 443
—— *v.* Thames & Isis Navigation Comm. 178
—— *v.* Thatcher 464
—— *v.* Theoderick 16
—— *v.* Tower 463
—— *v.* Tregony 464
—— *v.* Trustees of Norwich Roads 672
—— *v.* Trustees of Swansea Harbor 460
—— *v.* Turkey Co. 464
—— *v.* Vice-Chancellor of Cambridge 10, 464
—— *v.* Whitaker 20
—— *v.* Williams 464, 473
—— *v.* Wilts & Berks Canal Nav. 441
—— *v.* The King *v.* Winwick 21
—— *v.* Worcester Canal Co. 62, 65
Rexford *v.* Knight 127, 128, 137, 149
Reynolds *v.* Dunkirk & State Line Railway 110
—— *v.* Tappan 237
Rice *v.* Turnpike Co. 136
Rich *v.* Basterfield 379
Richards *v.* Fuqua 245
—— *v.* London Brighton & South Coast Railw. 243
—— *v.* Scarborough Public Market Co. 191
Richardson *v.* South E. Railway Co. 681
—— *v.* Vt. Cen. R. Co. 156, 161
—— *v.* The Wil. & R. Railw. 330
Richmond, F. & P. Railw. *v.* Louisa Railw. 130, 539, 546, 552, 553
Richmond & Pittsburgh Railway *v.* Jones 364
Ricker *v.* Fairbanks 207
Ricketts *v.* East & West India Docks & Bir. J. Railw. 362, 374
Ridley *v.* Kingsbridge Flour Mill 400
—— *v.* Plymouth Banking Co. 407
Rigby *v.* Great Western Railw. 498
Riley *v.* Horne 266
Ringgold *v.* Haven 320
Rioter's case, The 441
Ripley *v.* Sampson 71
Ripon, Earl of, *v.* Hobart 502
Ritz & Pringle *v.* Penn. Central Railway 303
River Dun Nav. Co. *v.* North Mid. Railw. 93, 475, 476, 478
Robbins, *ex parte* 461
Roberts *v.* Button 404, 405
—— *v.* Mobile & Ohio R. 692–697
—— *v.* Price 19
—— *v.* Read 396
—— *v.* Smith 389
Robertson *v.* Great Western Railway 476
—— *v.* New York & Erie Railw. 332
Robinson *v.* Austin 320
—— *v.* Baker 239, 315
—— *v.* Cone 263, 330
—— *v.* Dunmore 242, 248
—— *v.* Smith 494
Roch. & Sy. Railw. *v.* Budlong 136, 142, 144
Rochester White Lead Co. *v.* The City of Roch. 171
Roe *v.* Birkenhead Railw. 32, 293
Rogers, *ex parte* 443
—— *v.* Bradshaw 130, 148, 149, 159
—— *v.* Head 261
—— *v.* Huntington Bank 44
—— *v.* Kennebec & Portland Railway 157, 166
—— *v.* West 692, 697
Roman *v.* Fry 38, 44
Rome Railw. *v.* Rome 530, 531
—— *v.* Sullivan 255, 320
Rood *v.* New York and Erie Railway 359
Rooke *v.* Midland Railw. 291, 292
Root *v.* Goddard 596
—— *v.* Wallace
Rosevelt *v.* Brown 58, 68
Roskell *v.* Waterhouse 271
Ross *v.* The Eliz. & Som. R. 140, 142, 147
—— *v.* Lafayette & Ind. Railw. 81
—— *v.* Madison 384
—— *v.* Paige 477
Rouch *v.* Great Western Railw. 212
Rounds *v.* Mumford 161
Rowe *v.* Pickford 305
—— *v.* Shilson 199
Rowley *v.* Horne 271
Roxbury *v.* Boston & Providence Railw. 109, 110, 560
Royal British Bank, *v.* Brockwell's case 100, 101
—— *v.* Turquand 408, 409
Rubottom *v.* McClure 149

Page
Rundle *v.* Delaware and Raritan Canal Co. 6, 134, 543
Runyon *v.* Central Railw. 331
Rushforth *v.* Hadfield 317
Russell *v.* Austwick 285
—— *v.* The East Anglian Railw. 574
—— *v.* Hudson River R. 388
—— *v.* Livingston 235
Rust *v.* Low 126, 374
Ryan *v.* Cum. Valley Railw. 387
Ryder *v.* Alton & Sangamon Railw. 72
82, 533

S.

Sabin *v.* Bank of Woodstock 601
—— *v.* Vermont Central Railway 152, 154
Sadd *v.* Maldon, Witham & Braintree Railway 190, 672
Sage *v.* Dillard 560
Sager *v.* P., S. & P. Railway Co. 262, 268, 269, 275
Sagory *v.* Dubois 72
Sagory Mill-Dam Corp. *v.* Ropes 37, 71, 79, 638
Salmon *v.* Randall 488
Salomons *v.* Laing 400, 403, 490, 652
Saltmarsh *v.* Planters & Merchants Bank 603
Saltus *v.* Everett 316
Sampson *v.* Bowdoinham Steam Mill Co. 18
San Antonio *v.* Lewis 203
Sandback *v.* Thomas 346
Sanders *v.* St. Neot's Union 427
Sanderson *v.* Cockermouth & Washington Railway 107
—— *v.* Lamberton 239
Sandford *v.* The Catawissa, &c. Railroad Co. 242, 478
Sanford *v.* Housatonic Railway 322
Sangamon & Morgan Railway *v.* County of Morgan 526
—— *v.* Henry 318
Sanquer *v.* London & Southwest Railw. 249
Sargeant *v.* Franklin Insurance Co. 43, 44, 62
Sargent *v.* Webster 20
Sater *v.* Burlington & Mt. Pleasant Railw. 361
Satterlee *v.* Mathewson 548
Saunderson *v.* Cockermouth & W. Railw. 485
Savings Bank *v.* Davis 16
Sawyer *v.* Joslyn 306
—— *v.* Rut. & Bur. Railway 419, 430

Page
Sayles *v.* Blane 47, 68
Sayre *v.* North W. Turnpike Co. 6
Schopman *v.* Boston & Worcester Railway 354
Schroeder *v.* Hudson River R. 290, 291
Schuler *v.* Northern L. Railway 129
Schuylkill Co. *v.* Thoborn 135
Scoggs *v.* Balt. & Wash. Railw. 408
Scotthorn *v.* South Staffordshire Railway 282, 287, 291
Scott *v.* Avery 223, 224
—— *v.* Eagle Fire Co. 17
—— *v.* Morgan 442
—— *v.* W. & R. Railw. 366, 692–697
—— *v.* Liverpool 692–697
Scoville *v.* Griffith 320
Scudder *v.* Woodbridge 388, 390
Sea, Fire & Life Assurance Co. 77
Sears *v.* Boston 512
Seddon *v.* Connell 60
Seeden *v.* Plymouth R. R. Co. 591
Selma & Tenn. Railway *v.* Hall 87
—— *v.* Tipton 8, 97
Selway *v.* Holloway 248
Semmes *v.* Mayor, &c. of Columbus 414
Semple *v.* London & Birmingham Railway 123, 503, 509, 510
Seneca Railway *v.* Aub. & Roch. Railway 156, 159, 161
Serrell *v.* Derbyshire, Staffordshire & Wor. J. Railway 405
Sewall *v.* Allen 237, 294
Sewell *v.* Lancaster Bank 44
Seymour *v.* Milf. & Chillicothe Turnpike Co. 591
Shand *v.* Henderson 174
Sharp *v.* Grey 323
Sharpe *v.* Great Western Railway 225
Sharpless *v.* Mayor of Philadelphia 383, 548
Sharrod *v.* London & N. W. R. 361, 383
Shaw *v.* Boston & Worcester Railway 340, 394, 396
—— *v.* Dennis 533
—— *v.* Fisher 54, 55
—— *v.* Holland 54
Shaw et al. *v.* N. C. Railway 582, 583
Shaw *v.* Perkins 443
—— *v.* Rowley 47
—— *v.* South Carolina Railway 320
Sheffield *v.* Rochester & Syracuse Railway 331
Sheffield Ashton-under-Lyne & Manchester Railway Co. *v.* Woodcock 22, 45, 82, 632, 634
Shepherd *v.* Naylor 309
Sherman *v.* Mayor of New York 208

Page

Sherman *v.* New York Central R. 429
—— *v.* Rochester, &c. R. 384, 386
—— *v.* Vt. Central Railway 204
Shields *v.* Davis 314
Shipley *v.* Mechanics Bank 456
Shirley *v.* Ferrers 640, 663
Shoenberger *v.* Mulhollan 142, 535, 540, 674
Short *v.* M'Carthy 600
Shorter *v.* Smith 134
Shortridge *v.* Bosanquet 42
Shrewsbury & Birm. R. *v.* Lond. & N. W. R. & Shropshire Union R. 419, 421, 429, 435, 437, 498, 579, 654
—— *v.* Stour Valley & The London & Northwestern Railw. 623
Shrewsbury & Chester R. *v.* The Shrewsbury & B. Railway 504
Shunk *v.* Schuylkill Nav. Co. 114, 161
Shyle *v.* Auburn & Rochester Railway 368
Sigfried *v.* Levan 49
Sills *v.* Brown 398
Simkins *v.* Norwich & New London Steamboat Co. 286
Simons *v.* Great Western Railway 269, 301, 306, 491
Simpson *v.* Denison 355, 418, 437
—— *v.* Hand 330
—— *v.* Howden 644, 646, 656
—— *v.* Lancaster & Carlisle R. 671
Sims *v* Bond 239
—— *v.* Commercial Railway Co. 671
Sinclear *v.* Eldred 346
—— *v.* Pearson 383
Sir John Lade *v.* Shepherd 160
Sisson *v.* Matthews 604
Skerratt *v.* North Staffordshire R. 369
—— *v.* Housatonic Railw. 339
—— *v.* London, B. & S. R. 326, 329
—— *v.* Upshaw 314
Skip *v.* Eastern Counties R. 386, 387
—— *v.* Harwood 591
Slack *v.* Maysville & Lexington Railway 533, 534, 560
Slade *v.* Rigg 581
Slater *v.* Emerson 202
Slaymaker *v.* Gettysburg Bank 39
Sleat *v.* Fagg 273
Sleath *v.* Wilson 383
Slim *v.* Great Northern Railw. Co. 292
Slocum *v.* Fairchild 279
Small *v.* Herkimer M. & H. Co. 73
Smart *v.* The Guardians of the Poor of the West Ham Union 425
Smith *v.* Atkins 590
—— *v.* Birmingham Gas Co. 284
—— *v.* Boston 160, 456
—— *v.* Crocker 49

Page

Smith *v.* Darley 19
—— *v.* Eastern Railway 362
—— *v.* Erb 442
—— *v.* Helmer 150
—— *v.* Horne 273
—— *v.* Hull Glass Co. 408
—— *v.* London & Birmingham R. 303
—— *v.* McAdam 150
—— *v.* Maryland 167
—— *v.* Nashua & L. Railw. 253, 254
—— *v.* Pelah 358
—— *v.* Prattville Man. Co. 495
—— *v.* Steamboat Co. 602
Smyrl *v.* Niolon 233
Snodgrass *v.* Gavit 224
Snow *v.* Carruth 314
—— *v.* Eastern Railway Co. 311
Snowden *v.* Davis 335
Society of Practical Knowledge *v.* Abbott 38, 494
Somerville & Eastern Railway *v.* Doughty 135, 136, 139
Soper *v.* Buffalo & Roch. R. 399, 400
South Bay Meadow Dam Co. *v.* Gray 36, 73, 95
S. C. R., *ex parte* 192
South Carolina Railw. *v.* Blake 122, 184, 192
Southcote's case 265
Southeastern Railw. *v.* Brogden 213
—— *v.* European & Am. Telegraph Co. 198, 383
—— *v.* Jortin 572
—— *v.* Knott 485
—— *v.* Regina 196
Southmayd *v.* Russ 44, 608
South Staffordshire Railw. *v.* Burnside 68
—— *v.* Hall 485, 682
S. Wales Railw. Co. *ex parte* 677
—— *v.* Richards, *in re* 369, 470
Southwestern Railw. *v.* Coward 681
Southwick *v.* Estes 380
—— *v.* Stevens 346
South Yorkshire R. *v.* Great N. R. 419, 579
South Yorkshire & Goole Railw. *in re* 442
Spade *v.* Hudson River Railw. 247
Sparks *v.* Liverpool Waterworks 102
Sparling *v.* Parker 38
Sparrow *v.* Evansville & Crawfordsville Railw. 96
—— *v.* Oxford, Worcester & W. Railw. Co. 116, 667, 668, 670
Spear *v.* Crawford 72
—— *v.* Richardson 144
Spear & Carlton *v.* Newell 417
Spencer *v.* London & B. Railw. 504, 512

Page
Spencer *v.* Utica & Sch. Railw. 330
Spiller *v.* Spiller 504
Spooner *v.* McConnell 167, 477
Spottiswoode's case 638
Sprague *v.* Trustees of Vermont Central Railway 354
—— *v.* Whittemore 350
Springfield *v.* The Conn. River R. 117, 121, 130, 159, 160, 486, 515, 561
Spry *v.* Emperor 355
Squire *v.* Campbell 187
St. James's Club, *in re* 637
St. John *v.* St. John 663
—— *v.* Van Santvoord 285, 286, 296
St. Louis County Ct. *v.* Sparks 465
St. Luke's Church *v.* Slack 465
St. Mary's Church 12
Stacy *v.* Vermont Cen. Railw. Co. 118, 119, 151
Stadhecker *v.* Combs 240, 312
Stahl *v.* Berger 49
Stainbank *v.* Fernley 60
Stamps *v.* Bir., Wolv. & Stour Valley Railw. Co. 671, 678
Standish *v.* Mayor of Liverpool 677
Stanhope *v.* Manners 587
Stanley *v.* Chester & Birkenhead Railway Co. 646
—— *v.* Stanley 58, 538
Stanton *v.* Wilson 97
Stapleton *v.* Nowell 353
Starr *v.* Child 160
Startup *v.* Macdonald 240
State *v.* Ashley 465, 472
—— *v.* Baltimore & Ohio Railw. 115, 546, 561, 598
—— *v.* Bank of Louisiana 17
—— *v.* Bank of Md. 603
—— *v.* Bently 528
—— *v.* Berry 531
—— *v.* Boston, Concord & Montreal Railway Co. 23, 123, 465, 473
—— *v.* Bosworth 538
—— *v.* Branin 528, 530
—— *v.* Buchanan 465
—— *v.* Chester & Evesham 442
—— *v.* Comm. Bank of Manchester 588
—— *v.* Commissioners of Mansfield 193, 530
—— *v.* Curran 605
—— *v.* Danser 528
—— *v.* Dawson 151
—— *v.* Digby 135
—— *v.* Directors of Bank 459
—— *v.* Fourth N. H. Turnpike Co. 603
—— *v.* Franklin Bank 39
—— *v.* Gilmore 519
—— *v.* Gorham 392
—— *v.* Great W. M. & Man. Co. 384
Page
State *v.* Holiday 456
—— *v.* A. P. Hunton et al. 473
—— *v.* Lagrange & Memphis Railway 606
—— *v.* McBride 472
—— *v.* Merry 472
—— *v.* Mexican Gulf Railw. 588, 590
—— *v.* Merchants Ins. Co. 472
—— *v.* Miller 137
—— *v.* Minton 531
—— *v.* Morris & Essex Railway 381, 517, 520
—— *v.* Norwalk & Danbury Turnpike Co. 192
—— *v.* Overton 31, 32
—— *v.* Rives 112, 128, 579, 591, 603
—— *v.* Ross 35, 530
—— *v.* St. Louis P. M. & Life Ins. Co. 472
—— *v.* Tunis 528, 531
—— *v.* Tupper 616
—— *v.* Turk 472
—— *v.* Vermont Central Railw. 382, 515, 521
—— *v.* Wilm. & Manch. Railway 422
—— *v.* Bank of Ohio *v.* Knoop 527, 530, 531, 532, 560
State of New Jersey *v.* Wilson 529, 552
State of Penn. *v.* Wheeling Bridge Co. 167, 169
Steamboat Co. *v.* Atkins & Co. 239
Steamboat Cr. Palace *v.* Vanderpool 243
Steamboat Lynx *v.* King 234
Steamboat New World *v.* King 328
Steamer H. M. Wright 313
Stebbins *v.* Phœnix Fire Insurance Co. 601
Steel *v.* Southwestern Railway 171, 377, 379
Steele *v.* Harmer 409
Steigenberger *v.* Carr 634
Stein *v.* Mobile 528, 533
Steiner's Appeal 571
Stephens *v.* De Medina 51
Stephenson *v.* Hart 249
—— *v.* N. Y. and Harlaem Railroad 292
Stetson *v.* Faxon 160
Steubenville and Ind. Railway *v.* Trustees of Jackson 536
—— *v.* Tr. of North Township 533
Stevens *v.* Buckman 477
—— *v.* Boston & Maine Railw. 259
—— *v.* Rutland and Burlington Railway 92
—— *v.* South Devon Railway 14, 421, 438, 496, 597
Stewart's Estate, *in re* 105

Page
Stewart *v.* Anglo California Gold Mining Company 102
—— *v.* Cauty 51, 53
—— *v.* Hamilton College 97
—— *v.* Little Miami Railway 479
—— *v.* Raymond Railway 151, 674
Stikeman *v.* Dawson 90
Stiles *v.* The Western Railway 203
Stilphin *v.* Smith 27
Stocker *v.* Wedderburn 512, 514
Stockbridge *v.* West Stockbridge 3
Stocker & White *v.* Sullivan Railw. 303
Stockton *v.* Frey 324, 327
Stockton & Hartlepool Railw. *v.* Leeds & Th. & Clar. Railw. 505, 662
Stoddard *v.* L. I. Railway 267, 275
—— *v.* Onondaga Annual Conference 9
Stokes *v.* Grissell 194
—— *v.* Lebanon & Sparta Turnpike Co. 73
—— *v.* Saltonstall 324, 334
Stone *v.* Cambridge 121
—— *v.* The Commercial Railway 174, 476, 480, 667, 671
Stoneham Branch Railw. *v.* Gould 74, 79
Stoney *v.* American Life Ins. Co. 595
Storer *v.* Great Western Railway 499
Stormfeltz *v.* Manor Turnpike Co. 117
Story *v.* Finnis 353
Straffon's Executors, *ex parte* 42
Strasburgh Railway *v.* Etchternact 660
Stratford and Moreton Railway *v.* Stratton 79, 81
Stratton *v.* New York and New Haven Railway 242, 350
Straus *v.* Eagle Ins. Co. 692–697
Strickland *v.* Mississippi Railway 534
Strong, Petitioner, &c. 442
Strong *v.* Ellsworth 635
Struthers *v.* Clark 601
Stuart, Lord, *v.* The London and Northwestern Railway 649, 656, 659
Stubbs *v.* Lister 102
Sullivan *v.* Ph. & Reading R. 354, 364
Sunbury & Erie Railw. *v.* Hummel 155
Susquehanna Bridge Co. *v.* General Insurance Co. 575
Susquehanna Canal Co. *v.* Bonham 591, 606
—— *v.* Wright 114, 543
Sutton *v.* Clark 161
—— *v.* Latham 51
—— *v.* Louisville 137
Sutton H. Improvement Company *v.* Hitchins 682
Suydam *v.* Moore & Loren 362, 394, 557
Swan *v.* Williamson 558
Swatara Railway *v.* Brune 89
Sweet *v.* Harney 240
Swift *v.* Dean 307
Swindler *v.* Hilliard 267
Syeds *v.* Hay 304
Symonds *v.* City of Cincinnati 112, 135

T.

Taff Vale Railway *v.* Giles 293, 333
—— *v.* Nixon 213
Talbot *v.* Dent 533
Talmadge *v.* Rensselaer & Saratoga Railw. 363
Tanner *v.* Tanner 66
—— *v.* Trustees of the Village of Albion 558
Tar River Nav. Co. *v.* Neal 72
Tarrant *v.* Webb 387
Tate *v.* Ohio & Miss. Railway 164
Tattersall *v.* Groote 223
Taunton *v.* South B. Turnpike Co. *v.* Whiting 71
Tawney *v.* Lynn & Ely Railway 671
Taylor *v.* City of St. Louis 161
—— *v.* Clemson 114, 191
—— *v.* Cole 511
—— *v.* Day 323
—— *v.* Hughes 43
—— *v.* Monnot 313
—— *v.* Newbern 534
—— *v.* Salmon 477
—— *v.* Shay 53
—— *v.* Southeastern Railway 358
Taylor & York North Midland Railway, *In re* 673
Teall *v.* Sears 260
Tempest *v.* Kilner 39, 54
Terry *v.* New York Central Railw. 363
Tew *v.* Harris 690
Thames Haven Dock & Railway Co. *v.* Hall 18, 182, 492
Thames Haven Railway Co. *v.* Rose 18, 20, 22
Thames Steamboat Co. *v.* Housatonic Railway 384
Thames Tunnel Co. *v.* Sheldon 44, 82
Thayer *v.* Vermont Central Railw. 204
Theobald *v.* Railway Passenger's As. Co. 347
Thicknesse *v.* Lancaster Canal Co. 461, 489, 685
Thigpew *v.* Miss. Central Railw. 692–697
Thomas *v.* Boston & Prov. Railway 254, 258
—— *v.* Daniel 560
—— *v.* Winchester 430

Page

Thompson, *ex parte* 442
—— *v.* Brown 594
—— *v.* Charnock 223
—— *v.* Ebetts 527
—— *v.* Grand Gulf R. 147, 151
—— *v.* Kelly 534
—— *v.* New Orleans & Carrollton Railway 379
—— *v.* New York & H. Railway 117, 501, 540
—— *v.* Thompson 38
—— *v.* West Somerset Railway 163
Thomson *v.* Wells 292
Thorne *v.* Taw Vale Railway 3
Thorogood *v.* Bryan 332, 337, 354
Thorp *v.* Hughs 86
Thorpe *v.* The Rut. & Burlington Railway 6, 131, 526, 527, 538, 549, 560
Tillotson *v.* Hudson River Railway 172
Tilson *v.* Warwick Gas-Light Co. 462
Timmons *v.* Central Ohio R. 340, 391
Tinsman *v.* Belvidere Del. Railw. 157, 560
Tippetts *v.* Walker 39, 591
Todd *v.* London & Southwestern R. 524
Toledo Bank *v.* Bond 6, 117, 551, 552, 560
Tombs *v.* Rochester & Syracuse R. 373
Tomlinson *v.* Manch. & Birm. R. 116
—— *v.* Tomlinson 38
Tonawanda Railway *v.* Munger 363, 375
Tooke, *ex parte*, *in re.* The Londonderry, &c. Railway 64
Tooker *v.* Oakley 494
Tooney *v.* London, B. & South Coast R. 430
Tower *v.* Eastern Counties Railw. 514
—— *v.* Prov. & Worcester R. 363, 376
—— *v.* Utica & Sch. Railway 243, 248
Towle *v.* The State 457
Town *v.* Bank of R. Raisin 603
Towns *v.* Cheshire Railway 361, 375
Townsend *v.* Ash 39
Townshend *v.* Susquehanna Turnpike Co. 430
Tracy *v.* Yates 87
Travis *v.* Waters 514
Tremain *v.* Cohoes Co. 152
Trent & Mersey Nav. Co. *v.* Wood 233
Trinity Church case 560
Trow *v.* Vermont Central Railway 333, 364, 394, 554
Trowbridge *v.* Chapin 248
Troy *v.* Cheshire Railway 159, 174
Troy & Boston Railway *v.* Lee 135, 139
—— *v.* Northern Turnpike Co. 139, 142, 146
—— *v.* Warren 97

Page

Troy & Boston Railw. *v.* Tibbits 72, 88, 97
Troy & Rut. R. *v.* Kerr 72, 98, 419, 579
Troy Turnpike Co. *v.* M'Chesney 72
Trueman *v.* Loder 52
Trustees of the Presby. Society of Waterloo *v.* Auburn & Roch. Railw. 5, 158, 160
Tuckahoe Canal Co. *v.* T. & J. River Railway 117, 540
Tucker *v.* Chaplin 327
—— *v.* The Cheshire Railway 478
Tunnel *v.* Pettijohn 295
Thurnell *v.* Balbirnie 223
Turner *v.* Goodrich 307
—— *v.* Sheffield & Roth. R. 152, 174
Turnpike Co. *v.* Brosi 181
—— *v.* Hosmer 192
—— *v.* Wallace 6
Tyley *v.* Morrise 274
Tyron *v.* Fairclough 591
Tyrrell *v.* Woolley 405

U.

Underhill *v.* N. Y. & Harlaem R. 366
—— *v.* Saratoga & Wash. R. 106
Underwood *v.* Hart 203
Union Bank *v.* Jacobs 575
—— *v.* Laird 44
Union Bank of Tennessee *v.* State 39
Union Branch Railw. *v.* E. Tenn. & Geo. Railw. 603
Union Lock & Canal Co. *v.* Towne 91
United States *v.* Arredondo 116
—— *v.* Harris 125, 127
—— *v.* New Bedf. Bridge Co. 167
—— *v.* Railw. Bridge Co. 113, 169
—— *v.* Robeson 224
—— *v.* Thomas Swan 354
—— *v.* Vaughan 44
University *v.* Foy 560
—— *v.* Louisville 560
University of Alabama *v.* Winston 560
University of Maryland *v.* Williams 560
Unthank *v.* Henry Co. Turnp. Co. 74
Upfill's case 73, 604, 637
Upton *v.* So. Reading B. Railw. Co. 135, 142
Utica Bank *v.* Smalley 44
Utica & Sch. R. *v.* Brinkerhoff 78, 98

V.

Vail *v.* Morris & Essex Railw. 140, 441, 146
Vandegrift *v.* Railw. 385
—— *v.* Rediker 364, 375, 394
Vanderbilt *v.* Adams 560
—— *v.* Richmond T. Co. 384

Page
Vanderkar *v.* Rens. & Sara. R. 370, 375
Vanderwerker *v.* Vermont Central Railw. 204
Vandine's case 558
Vane *v.* Cobbold 605
Van Santvoord *v.* St. John 258, 282, 283, 286
Van Wickle *v.* Railw. 119, 140, 145, 470
Varick *v.* Edwards 56
Varrick *v.* Smith 112
Varillat *v.* New O. & Car. Railw. 396
Vaughn *v.* Taff Vale Railw. 692–697
Vauxhall Bridge Co. *v.* Earl of Spencer, et al. 639, 643, 663
Vayne *v.* Hanham 581
Vermont Cen. Railw. Co. *v.* Baxter 120, 123, 420
—— *v.* Burlington 193, 529
—— *v.* Clayes 97
—— *v.* Hills 107
Vermont & Mass. Railw. *v.* Fitchburg Railw. 560
Vicks. & Jackson Railw. *v.* Patton 692–697
Vicks. S. & Texas Railw. 86
—— *v.* Ouachita 534
Victory *v.* Fitzpatrick 174
Violet *v.* Simpson 396
Viseher *v.* Hudson River Railw. 679
Vollans *v.* Fletcher 564
Von Schmidt *v.* Huntington 13
Vose *v.* Grant 76

W.

Page
Wainwright *v.* Ramsden 181
Waite *v.* Gilbert 321
Waitman, *ex parte* 65
Waldo *v.* Martin 411
Waldron *v.* Portland, Saco, & Portsmouth Railw. 363
—— *v.* Rensselaer & Saratoga Railway 362, 557
Wales *v.* Stetson 560
Walker, *ex parte* 65
—— *v.* Bartlett 47, 56, 58
—— *v.* Bolling 390
—— *v.* Boston & Maine Railw. 113, 139, 140, 167
—— *v.* Devereaux 8, 70
—— *v.* Eastern Counties Railw. Co. 107, 485
—— *v.* Jackson 271
—— *v.* London & Blackwall Railw. 455, 671
—— *v.* London & Southwestern Railw. 303
Walker *v.* Mad River Railw. 479
—— *v.* Milne 38
—— *v.* Sherman 590
—— *v.* York & North M. Railw. Co. 278
Wallingford M. Co. *v.* Fox 635
Walworth *v.* Holt 477, 494
Walstab *v.* Spottiswoode 604, 636
Walter *v.* Belding 443
—— *v.* Brewer 237
Warburton *v.* London & Blackwall Railw. 480, 507
Ward *v.* Griswoldville M. Co. 72
—— *v.* Londesborough 636
—— *v.* The Society of Attorneys 497
Warden *v.* Greer 303
Ware *v.* Gay 327
—— *v.* Grand Junction Water Co. 13, 92
—— *v.* Regent's Canal Co. 690
Waring *v.* Manchester, Sheffield, & Lin. Railw. 213
Warner *v.* Mower 16, 609
Warring *v.* Williams 49
Washington Bridge *v.* State 540, 559, 560
Washington & Balt. Turnp. Co. *v.* Balt. & Ohio Railw. 538, 540
Waterford, Wexford W. & D. Railway *v.* Dalbiac 79
Waterford, Wex. & Wic. Railw. & D. Railw. *v.* Piddock 85
Waterman *v.* Troy & Greenfield R. 100
Water Power Co. *v.* Chamber 106, 109
Watertown *v.* White 576
Watkins *v.* Great Northern Railw. Co. 122, 173, 174
Watson *v.* The Ambergate, Not. & B. Railw. Co. 282, 283
—— *v.* Reid 109
Watts *v.* Salter 604, 636, 637
—— *v.* Watts 56
Webb, *In re* 258
—— *v.* Direct Lond. & Ports. Railway Co. 648, 649, 656, 658–660
Webb *v.* Man. & Leeds R. 116, 120, 398, 474, 671
Webber *v.* Nicholas 346
Weber *v.* Eastern R. 143
Webster *v.* Southeastern R. 498
Weed *v.* Saratoga & S. R. 235, 239, 284, 285, 286, 289
—— *v.* Panama Railway 293
Weeden *v.* L. Erie & Mad River R. 100
Welles *v.* Cowles 39
Welling *v.* Western Vt. R. 235
Wells *v.* Bridge 48
—— *v.* Howell 374

Page
Wells *v.* Steam Nav. Co. 267
Wentworth *v.* Outhwaite 305
West Branch Bank *v.* Chester 587
West Cornwall R. *v.* Mowatt 68, 592
West London R. *v.* London & N. W. R. 431
West Philadelphia Canal Co. *v.* Innes 83, 84
West *v.* Rensselaer & Sara. R. 290
West River Bridge Co. *v.* Dix 129, 132, 538, 540, 546, 555
Western Railway *v.* Babcock 109
Weston *v.* Bennett 203
—— *v.* City of Charleston 527
—— *v.* Foster 126
Westroop *v.* Solomon 50
Wetmore *v.* Story 162
Wetumpka *v.* Winter 536
Weyant *v.* N. Y. & Harlaem R. 390
Wheedon *v.* Camd. & Amb. R. 625
Wheeler *v.* N. Y. & Harlaem R. 627
—— *v.* Moulton 40, 575, 635
—— *v.* Roch. & Sy. R. 127, 155, 370
—— *v.* Young & Pratt 120
Whipple *v.* Walpole 144
Whitcomb *v.* Vermont Central R. 105, 157
White *v.* Bascom 322
—— *v.* Boston & Prov. R. 174
—— *v.* Boulton 323
—— *v.* Charlottesville & S. C. R. 135
—— *v.* Concord R. 144, 371
—— *v.* Fitchburg R. 143
—— *v.* Great Western R. 280
—— *v.* South Shore R. 155
—— *v.* Syracuse & Utica R. 535
—— *v.* Vann 314
—— *v.* Winnisimmet Co. 245
Whiteman *v.* Wilmington & Sus. Railw. 381, 517
White Mountain Road Co. (Petition of) 137
White Mountain R. *v.* Eastman 21, 70, 73, 80
White River Bank, *In re* 465
White River Turnpike Co. *v.* Vermont Cent. R. 129, 130, 159, 538, 540, 561
Whitesell *v.* Crane 311
Whitesides *v.* Russell 279
Whitfield *v.* Southeastern Railway 692–697
—— *v.* Zellnor 201
Whitmarsh Township *v.* Railw. Co. 456
Whitmore *v.* Steamboat Caroline 313
Whitney *v.* Clarendon 345
Whittier *v.* Portland & Ken. R. 157
Whitwell et al. *v.* Warner et al. 399, 609, 638
Wibert *v.* New York & Erie Railw. 262, 285, 318
Wiggett *v.* Fox et al. 389
Wiggin *v.* Free Will Bapt. Soc. 16
Wight *v.* Shelby R. 35, 70, 88
Wigmore *v.* Jay 386
Wilcocks, *ex parte* 20
Wilcox *v.* Parmelee 284
Wiley *v.* Moore 49
Wilkie *v.* Bolster 325
Wilkinson *v.* Anglo Cal. Gold Co. 62
—— *v.* Lloyd 41, 45, 53
Willard *v.* Newbury 391
Willetts *v.* N. Y. & Erie R. 340
Willey *v.* Parratt 564, 605
—— *v.* Southeastern R. 678
—— *v.* The West Cornwall Railw. 286
Williams *v.* Andros. & Ken. R. 202
—— *v.* Archer 54
—— *v.* Bank of Ill. 603
—— *v.* Chester & Holyhead R. 203
—— *v.* Gibbs 583
—— *v.* Grant 233
—— *v.* Great W. R. 27
—— *v.* Hartford & New H. R. 118
—— *v.* Jones 461
—— *v.* Mich. Cent. R. 363, 364, 375
—— *v.* Nat. Bridge Pl. Road Co. 160
—— *v.* New Alb. R. 374
—— *v.* Piggott 638
—— *v.* St. George's Harbor Company 662
—— *v.* South Wales R. 485, 671
Williamson, Trustee, *v.* New Alb. & Salem R. 591, 595
Williamson *v.* N. Y. Cent. R. 112, 159, 160, 372
Willing *v.* Baltimore R. 145
Willink *v.* Morris Canal & Banking Co. 590, 591
Willoughby *v.* Horridge 279
Wills *v.* Murray 16, 19, 20
Willyard *v.* Hamilton 149
Wilmington & Raleigh R. *v.* Robison 79
—— & Man. R. *v.* Saunders 11
Wilmot *v.* Corp. of Coventry 409
Wilson *v.* Ætna Ins. Co. 223
—— *v.* Anderson 3
—— *v.* Anderton 306, 307
—— *v.* Blackbird Creek Marsh Co. 167
—— *v.* Cunningham 3
—— *v.* Goodman 405
—— *v.* Hamilton 245
—— *v.* Railway 365
—— *v.* Roch. & Sy. Railway 518
—— *v.* Wilson 22
—— *v.* York & Md. Railway 209, 291

Page
Wilson *v.* York, Newcastle, and Berwick Railway 282, 318
Winch *v.* Birkenhead, L. & C. Railway 420, 579
Winchester and Lexington Turnpike Co. *v.* Vimont 591
Winter *v.* Muscogee Railway 91, 94
Winterbottom *v.* Wright 430
Wise *v.* Great Western Railway 278
Witmer *v.* Schlatter 638
Wolfe *v.* Covington & Lexington Railway 157, 159
Wolf *v.* Summers 317
Wontner *v.* Shairp 604
Wood *v.* Auburn & Roch. Railw. 404
—— *v.* Duke of Argyle 634
—— *v.* Dummer 76
—— *v.* North Stafford Railway 199
—— *v.* Vermont Central Railway 230
Woodbury *v.* Frink 321
Woodfolk *v.* N. & C. R. 134, 136, 137
Woods *v.* Devin 245
Woodstock *v.* Gallup 440, 469
Wookey *v.* Pole 505
Wooley *v.* Constant 49
Woolsey *v.* Dodge 533, 626
Woolson *v.* Northern Railway 374
Worcester *v.* Western Railway 530
Worcester & Nashua Railw. *v.* Hinds 79
Works *v.* Junction Railway 169, 625
Worley *v.* Cin. H. & Day. Railway 339
Wormwell *v.* Hailstone 462
Worrall *v.* Judson 58
Worsley *v.* S. Devon Railway 670
W. & P. Railw. *v.* Washington 145, 155
Wright *v.* Caldwell 245, 311
—— *v.* Fawcett 442
—— *v.* Petrie 76
—— *v.* Scott 168
—— *v.* Wilcox 381
Page
Wryley Nav. *v.* Bradley 158
Wyld *v.* Pickford 266, 274
Wyman *v.* Lexington & West Cambridge Railway 142, 690
Wynn *v.* Allard 394
—— *v.* Macon 536
—— *v.* Shropshire Union Railway & Canal 498
Wynne *v.* Price 55, 58

Y.

Yarborough *v.* The Bank of England 380, 516
Yarmouth *v.* North Yarmouth 560
Yetts *v.* Norfolk Railway 495
Yeiger's case 155
York *v.* Grenaugh 315
York & Cumberland Railway *v.* Pratt 79
York & Maryland Line Railway *v.* Winans 420, 603
York, Newcastle & Berwick Railw. *v.* Crisp 278, 279
York & N. M. Railway *v.* Hudson 494
York & North Midland R. *v.* Milner 460
—— *v.* Regina 445, 453
Young *v.* Harrison 150, 603
—— *v.* Hunter 239
—— *v.* Smith 245

Z.

Zabriskie *v.* Cleveland, Columbus & Cincinnati Railw. 9, 16, 404, 596
Zemp *v.* Wilm. & Manch. Railw. 334
Zimmerman *v.* The Union Canal Co. 114, 150, 161

THE LAW OF RAILWAYS.

CHAPTER I.

INTRODUCTION.

1. *Origin of railways in England.*
2. *First built upon one's own land, or by special license from the owner.*
3. *Questions in regard to private railways.*
4. *Railways in America, public grants.*
5. *Use of steam-power on railways.*

§ 1. 1. Although some of the Roman roads, like the Appian Way, were a somewhat near approach to the modern railway, being formed into a continuous plane surface, by means of blocks of stone fitted closely together, yet they were, in the principle of construction and operation, essentially different from railways. The idea of a distinct track, for the wheels of carriages, does not seem to have been reduced to practice until late in the seventeenth century. In 1676, some account is given of the transportation of coals near Newcastle, upon the river Tyne, upon a very imperfect railway, by means of rude carriages, whose wheels ran upon some kind of rails of timber.[1] About one hundred years afterwards, an iron railway is said to have been constructed and put in operation at the colliery near Sheffield. From this time they were put into very extensive use, for conveying coal, stone, and other like substances, short distances, in order to reach navigable waters, and sometimes near the cities, where large quantities of stone were requisite for building purposes.

2. These railways, built chiefly by the owners of coal-mines and stone quarries, either upon their own land or by special

1 Roger North's Life of Lord Keeper North, vol. 2, p. 281; Ency. Americana, Art. Railway, vol. 10, p. 478.

license, called way-leave, upon the land of others, had become numerous *long before the application of steam-power to railway transportation.

3. Some few questions in regard to the use of these railways, or tramways, at common law, have arisen in the English courts.[2] But as no such railways exist in this country, it would scarcely be expected we should here more than allude to such cases.[3]

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[2] Walford on Railways, 2; Keppell *v.* Bailey, 2 My. & K. 517; Hemingway *v.* Fernandes, 13 Simons, 228. These cases seem to establish the rule, that a covenant to erect a railway across the land of another, and to use the same exclusively for a given transportation, is binding upon the assignees of the interest.

But a mere covenant to use an adjoining railway, and pay a specified toll, does not run with the land then used by the covenantor, and from which he derives the material transported. Id.

[3] Walford, 3–10. The points chiefly discussed in the reported cases in reference to private railways, and railways at common law, are:—

1. That these way-leaves, or reservations, by which one man has the right to build a railway upon the land of others, or in the rightful occupation of others, are not to be limited to the kind of railway in use at the date of the reservation or grant, but will justify the building of a railway, suitable and convenient for the use for which the reservation or grant is made, and with all such needful or useful improvements, as the progress and improvements of art and science will enable the grantee to avail himself of. Dand *v.* Kingscote, 2 Railw. C. 27; s. c. 6 M. & W. 174. Hence it was considered that such railways might, upon the general application of steam-power to railways, adopt that as an improvement, coming fairly within the contemplated use of their grant or reservation, although wholly unknown at the date of their grant. Bishop *v.* North, 3 Railw. C. 459.

2. That this will not justify the grantee of a way-leave for a railway, for a special purpose, to erect one for general purposes of transporting merchandise and passengers. Dand *v.* Kingscote, 2 Railw. C. 27; Farrow *v.* Vansittart, 1 Railw. C. 602; Durham & Sunderland R. *v.* Walker, 3 Railw. C. 36. In this last case, which was a decision of the Exchequer Chamber, the way-leave was retained by the landlord in leasing the land, and the court say, it is not an exception, for it is not parcel of the thing granted, and it is not a reservation, as it did not issue out of the thing granted, but it is an easement, newly created, by way of grant, from the lessee. And that it was to be presumed the deed was executed by both parties, lessor and lessee.

But it was held, that where by a canal act, (32 Geo. 3, c. 100, § 54,) the proprietors of coal-mines, within certain parishes, are empowered to make railways to convey coal over the land of others, by paying or tendering satisfaction, that this power was not limited to such persons as were the proprietors, at the date of the act, but extended to subsequent proprietors. Bishop *v.* North, 3 Railw. C. 459.

3. That if the railway was such a railway as the company, at the time when it was made, might lawfully make, for the purposes for which, when made, they

*4. All railways and other similar corporations in this country exist, or are presumed to have originally existed, by means of an express grant from the legislative power of the state or sovereignty.[4]

5. The first use of locomotive engines upon railways for purposes of general transportation, does not date further back than October, 1829; and all the railways in this country, with one or two exceptions, have been built since that date.[5]

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might lawfully use it, the plaintiff, as reversioner, had no ground of complaint, by reason of the intention of the company to use it for other purposes, for which they had no right to use it, until such intentions were actually carried into effect. Durham & Sunderland R. *v.* Walker, 3 Railw. C. 36.

But where other parties have acquired the right to use a railway originally erected by private enterprise and for private purposes, the English courts at an early day restrained the owners of the railway by mandamus from taking up their track, and required them to maintain it in proper condition for public use. Rex *v.* Severn R. 2 B. & Ald. 646. But see Thorne *v.* Taw Vale R., 13 Beavan, 10.

4. That such way-leaves, for the erection and use of railways upon the land of others, may exist by express contract; by presumption or prescription; from necessity, as accessory to other grants; and by acquiescence, short of the limit of prescription. Barnard *v.* Wallis, 2 Railw. C. 162; Monmouth Canal Co. *v.* Harford, 1 C. M. & R. 614.

These railways, at common law and by contract, impose certain burdens upon the proprietors, as the payment of rent sometimes for the use of the land, tenant's damages, and the keeping their roads in repair, so as not to do damage to the occupiers of the adjoining lands. Wilson *v.* Anderson, 1 Car. & K. 544; Walford, *supra.*

[4] 2 Kent, Comm. 276, 277; Stockbridge *v.* West Stockbridge, 12 Mass. R. 400; Hagerstown Turnpike Co. *v.* Creeger, 5 Har. & J. 122; Greene *v.* Dennis, 6 Conn. R. 302; *Hosmer*, Ch. J., Franklin Bridge Co. *v.* Wood, 14 Ga. R. 80. But from the case of Wilson *v.* Cunningham, 3 California R. 241, it seems that the municipal authorities of San Francisco did assume to grant a private railway within the limits of the city. The court held the proprietor liable for the slightest negligence in its use, whereby third parties were injured.

[5] The celebrated trial of locomotive engines upon the Liverpool and Manchester Railway, for the purpose of determining the relative advantage of stationary and locomotive power upon such roads, and which resulted in favor of the latter, was had in October, 1829. The Quincy Railway, for the transportation of granite solely, by horse-power, was constructed about two years before this. But the Boston and Lowell Railway, one of the first railways in this country for general transportation of passengers and merchandise, by the use of steam-power and locomotive engines, was incorporated in June, 1830. And railways for purposes of general traffic were constructed about the same date in most of the older states, and very soon throughout the country.

* CHAPTER II.

PUBLIC RAILWAYS.

PRELIMINARY ASSOCIATIONS.

[For this chapter, § 2–16, see Appendix A.]

* CHAPTER III.

RAILWAYS ORDINARILY PRIVATE CORPORATIONS.

1. *Private corporations where stock is private property.*
2. *Public corporations where stock is owned, and the management retained, by the State.*
3. *Public corporations have no rights beyond the control of legislative authority.*

§ 17. 1. Railways in this country, although common carriers of freight and passengers, and in some sense regarded as public works, are ordinarily private corporations.[1] By private corporations nothing more is implied, than that the stock is owned by private persons.

2. If the stock is owned exclusively by the state, the corporation is a public one. And such public corporations are under the control of the legislature, the same as municipal corporations, and ordinarily acquire no such vested rights of property as are beyond the control of legislative authority.[2] The American cases

[1] There is no necessity for these public functions being confined to aggregate corporations, as is the universal practice in this country. The same franchises and immunities might be conferred upon any private person, at the election of the legislature, as was done by the legislature of New York upon Fulton and Livingston, in regard to steamboat navigation, which grant was held valid but for the United States Constitution. And whoever was the grantee, the same rights, duties, and liabilities would result from the grant, whether to a natural person or to a corporation.

[2] Dartmouth College *v.* Woodward, 4 Wheaton, R. 668; 2 Kent's Comm. 7th ed. (275) 305 and notes. If the question were entirely new, it might be re-

going to confirm this proposition, and to show that railways are private corporations, are numerous.[2]

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garded as admitting of some doubt, perhaps, how far the American States could with propriety undertake such extensive public works, whose benefit enures almost exclusively to private emolument and advantage. But the practice is now pretty firmly established. And there seems to be no proper tribunal to determine such questions between the states and the citizens. Public opinion is the only practical arbiter in such cases. And that is so much under the control of interested parties ordinarily, that its admonitions are not likely to be much dreaded by those who exercise the state patronage.

[3] 8 Smedes & M. 661. By the court, Trustees of the Presbyt. Society of Waterloo *v.* Auburn & Rochester Railway, 3 Hill, 570; Dartmouth Coll. *v.* Woodward, 1 New H. 116; Eustace *v.* Parker, 1 New H. 273; Dearborn *v.* Boston, C. & Montreal R. R. Co. 4 Foster, 190; Ohio, &c. Railroad Co. *v.* Ridge, 5 Blackf. 78; Bonaparte *v.* Camden & Amboy R. 1 Baldwin's C. C. R. 205, 222; Rundle *v.* Delaware & Raritan Canal Co. 1 Wallace, Jr. R. 275; R. & G. R. *v.* Davis, 2 Dev. & Batt. 451; Thorpe *v.* R. & B. R. 27 Vt. R. 140. This last case discusses at some length the right of legislative control over private corporations, whose functions are essentially public, like those of banks and railways. The importance of such control, within reasonable limits and under proper restrictions, both to the public interest and that of these corporations, will be obvious when we consider the magnitude of the interests committed to such corporations, and the vast amount of capital invested in such enterprises. We make no account of the banking capital of the country, most of which is occupied in business more or less connected with railway traffic. But the capital and business of railways is almost incalculable.

The length of railway in the United Kingdom of Great Britain and Ireland, in 1857, was 8635 miles, and the cost, in round numbers, £311,000,000 sterling, being more than one and one half billion of dollars. The amount invested in this country was about half as much, in 1851, and the number of miles in operation nearly twice as great, and almost as much more then in progress, a large portion of which is now complete. When it is considered that these private corporations, possessing such vast capital, have engrossed almost the entire travel and traffic of the country, and that their powers and functions come in daily contact with the material interests of almost every citizen of this great empire, the importance of their being subjected to a wise and just supervision can scarcely be overestimated. This can only be permanently secured, by wise and prudent legislation. And to be of much security to public interests, it must be by general acts, as it is in many of the states, and in England, since 1845. It is worthy of remark, we think, that while in the United States, a large proportion of the capital invested in railways, has proved, hitherto, wholly unproductive, and much of it has already proved a hopeless loss, and a very small proportion of the whole can be said to have been at all remunerative; in Great Britain the whole amount of their loan and preference stock, secured virtually by way of mortgage, has produced, upon an average, more than five per cent, and the ordinary stock has produced an average dividend of more than three per cent.; and in France rail-

*3. It does not alter the character of a private corporation, that the state or the United States own a portion of the stock.[4] But a turnpike company or other corporation, managed exclusively by state officers, and at the expense and for the benefit of the state at large, is a public corporation.[5]

*CHAPTER IV.

PROCEEDINGS UNDER THE CHARTER.

SECTION I.

ORGANIZATION OF THE COMPANY.

1. *Conditions precedent must be performed.*
2. *Stock must all be subscribed, ordinarily.*
3. *Charter, location of road, condition precedent.*
4. *Colorable subscriptions binding at law.*
5. *Conditions subsequent, how enforced.*
6. *Stock distributed according to charter.*
7. *Commissioners must all act.*
8. *Defect of organization must be plead.*
9. *Question cannot be raised collaterally.*
10. *Records of company, evidence.*

§ 18. 1. To give the corporation organic life, the mode pointed out in the charter must ordinarily be strictly pursued. Conditions precedent must be fairly complied with.[1] Thus, where a given amount of capital stock is required to be subscribed or paid in before the corporation goes into operation, this is to be regarded as an indispensable condition precedent.[2] But if the

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ways have proved still more productive, making average dividends throughout the empire, for the year 1857, of nine per cent. upon the whole investment, some as high as 16 per cent., and one, the Lyons & Marseilles line, 23 per cent. It is difficult to account for the difference in results, without suspecting something wrong somewhere.

4 Bank of the United States *v.* The Planters' Bank of Georgia, 9 Wheaton, 904; Miners' Bank *v.* United States, 1 Greene, (Iowa,) 553; Turnpike Co. *v.* Wallace, 8 Watts, 316.

5 Sayre *v.* North W. Turnpike Co. 10 Leigh, 454. But see Toledo Bank *v.* Bond, 1 Ohio State Reports, 657. Opinion of *Storrs*, J., in Bradley *v.* New Y. & New H. R. 21 Conn. R. 304, 305.

1 Angell & Ames on Cor. ch. 3, § 95–112; 2 Kent's Comm. 293 *et seq.*

2 *Post*, § 51, and cases cited. Bend *v.* Susquehannah Bridge, 6 Har. & Johns.

charter is in the alternative, so that the stock shall not be less than one sum or greater than another, the company may go into operation with the less amount of stock, and subsequently increase it to the larger.[2]

2. And where business corporations are created, with a definite capital, it is regarded as equivalent to an express condition, that the whole stock shall be subscribed before the company can go into full operation; and, in the case of banks, it must be paid, in specie, in the absence of all provision to the contrary, before they can properly go into operation.[3]

*3. In some cases it is a condition of the charter, or of the subscriptions to the stock, that the track of a railway shall touch certain points, or that it shall not approach within certain distances of other lines of travel. This class of conditions, so far as they can practically be denominated conditions precedent, must be strictly complied with, before the company can properly go into operation so as to make calls.

4. But it has been held, that colorable subscriptions to stock, in order to comply with the requisites of the charter, are not to be regarded as absolutely void. They are binding upon the subscribers themselves. And they are binding upon the other subscribers unless, upon their first discovery, they take steps to stay the further proceedings of the corporation, which may be

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128; Gray *v.* Portland Bank, 3 Mass. R. 364; Minor *v.* The Mechanics Bank of Alexandria, 1 Peters, (U. S.) R. 46. Opinion of *Story*, J. And where a corporation is formed, or attempted to be formed, under general statutes, the inchoate proceedings do not ripen into a corporation, until all the requirements of the statute, even the filing of the articles in the office of the secretary of state, are complied with. And until this is done, the subscription of any one to the articles is a mere proposition to take the number of shares specified, of the capital stock of the company thereafter to be formed, and not a binding promise to pay. The obligation is merely inchoate and can never become of any force, unless the corporation goes into effect in the mode pointed out in the statute. And until that time, the subscriber may revoke the offer, and if the articles are in his possession or control, erase his name. Burt *v.* Farrar, 24 Barb. 518.

3 King *v.* Elliott, 5 Sm. & Mar. 428; *post*, § 51. But a requirement in the charter of a railway company, that $1,000 per mile shall be subscribed, and ten per cent. paid thereon in good faith, does not require ten per cent to be paid by each subscriber, in order to the performance of the condition. It is a sufficient compliance with such requirement, if that proportion on the whole subscription be paid. Ogdensb., Rome, & Clay. R. *v.* Frost, 21 Barb. 541.

done in a court of equity. If there has been unreasonable delay, in opposing the action of the corporators, upon the faith of such subscriptions, or if matters have progressed so far, before the discovery of the true character of the subscriptions, by the parties liable to be injuriously affected by them, as to render it difficult to restore the parties to their former rights, the corporation will still be allowed to proceed, notwithstanding the fraud upon the charter.[4]

5. Conditions subsequent in railway charters, by which is to be understood such acts as they are required to perform after their organization, will ordinarily form the foundation of an action at law, in favor of the party injured; or they may be specifically enforced in courts of equity, in cases proper for their interference in that mode; or, if the charter expressly so provide, proceedings, by way of *scire facias*, to avoid the charter may be taken.[5]

6. Where a statute declares certain persons by name, and such other persons, as shall hereafter become stockholders, a corporation, *the distribution of the stock, in the mode pointed out in the statute, is a condition precedent to the existence of the corporation.[6]

7. Where the charter of a railway company appoints a certain number of commissioners, to receive subscriptions and distribute the stock, in such manner as they shall deem most conducive to the interests of the company, making no provision in regard to a quorum, all must be present, to consult, when they distribute the stock, although a majority may decide, this being a judicial act. Receiving subscriptions is a merely ministerial act, and may be performed by a number less than a majority.[6]

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[4] Walker *v.* Devereaux, 4 Paige, Ch. R. 229. The entire ground of chancery jurisdiction in regard to the conduct of commissioners or corporations in making colorable subscriptions of stock is here very fully discussed by the learned Chancellor. And the conclusion arrived at seems the only practicable one, that colorable subscriptions or fraudulent distribution of stock will not defeat the legality of the organization of the corporation, unless the thing is arrested *in limine*. Johnston *v.* S. W. R. R. Bank, 3 Strob. Eq. R. 263; Selma & Tenn. R. R. *v.* Tipton, 5 Alabama R. 787; Hayne *v.* Beauchamp, 5 Sm. & M. 515. The decision of the commissioners is conclusive upon the company and shareholders at law certainly. Crocker *v.* Crane, 21 Wendell, 211.

[5] 2 Kent, Comm. 305 and notes.

[6] Crocker *v.* Crane, 21 Wendell, 211; s. c. 2 Am. Railw. C. 484.

8. Questions in regard to the organization, or existence of the corporation, can only be raised ordinarily upon an express plea, either in abatement or in bar, denying its existence.[7]

9. But all the cases concur in the proposition, that the existence of the corporation, the legality of its charter, and the question of its forfeiture, cannot be inquired into, in any collateral proceeding, as in a suit, between the company and its debtors, or others, against whom it has legal claims.[8]

10. The records of the corporation are *primâ facie*, but not indispensable evidence, of its organization and subsequent proceedings.[9] But the authenticity of the books, as the records of the corporation, must be shown by the testimony of the proper officer entitled to their custody, or that of some other person cognizant of the fact.[10]

*SECTION II.

ACCEPTANCE OF CHARTER, OR OF MODIFICATION OF IT.

1. *New or altered charter must be formally accepted.*
2. *Subscription for stock sometimes sufficient.*
3. *Inoperative unless done as required.*
4. *Assent to beneficial grant presumed.*
5. *Matter of presumption and inference.*
6. *Organization or acceptance of charter may be shown by parol.*

§ 19. 1. It is requisite to the binding effect of every legislative charter (or modification of such charter) of a joint-stock com-

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7 Boston Type and Stereotype Foundry *v.* Spooner, 5 Vt. R. 93, and cases cited; Railsback *v.* Liberty & Abington Turnp. Co. 2 Carter, 656. But some cases seem to require such proof to establish the contract. Stoddard *v.* The Onondaga Annual Conference, 12 Barb. 573.

8 Duke *v.* Cahawba Nav. Co. 16 Alabama R. 372; *post*, § 242, note 6. But in an action against a stockholder for the debt of the company under the statute, the existence and organization of the company must be proved; and judgment against the company is not evidence against the stockholder. 20 Law Rep. 216; C. P. & A. Rail. *v.* City of Erie, 27 Penn. R. 380.

9 Ang. & Am. § 513; Grays *v.* Lynchb. & Salem T. Co. 4 Rand. (Va.) R. 578; Buncombe T. Co. *v.* McCarson, 1 Dev. & Bat. 306; Greenl. Ev. § 492; Rex *v.* Martin, 2 Camp. 100; Hudson *v.* Carman, 20 Law Rep. 216. All that a corporation is called upon to prove, to establish its existence in a litigation with individuals dealing with it, is its charter and user under it. This constitutes it a corporation *de facto*, and this is sufficient, in ordinary suits, between the corpo-

10 Highland Turnp. Co. *v.* McKean, 10 Johns. 154.

pany, that it should be accepted by the corporators.[1] This question more commonly arises, in regard to the modification of a charter, or the granting of a new charter, the company in either case, whether under the old or the new charter, going forward to all appearance much the same as before. In such case, it has usually been regarded as important to show some definite act of at least a majority of the corporation.[2]

2. The question of acceptance becomes of importance often, where a partnership, or some of its members, obtain an act of incorporation. But ordinarily, in the first instance, the assent of the stockholders, or corporators, is sufficiently indicated by the mere subscription to the stock.

3. Where a statute in relation to a corporation required acceptance, in a prescribed form, and that is not complied with, the corporation can derive no advantage from the act.[3]

4. It has been held, that grants beneficial to corporations may be presumed to have been accepted by them, the same as in the case of natural persons.[4]

5. And in the majority of instances, perhaps, the acceptance is *rather to be inferred from the course of conduct of the company than from any express act.[5]

6. It may always be proved by oral testimony, as may also the organization of the company ordinarily.[6]

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ration and its debtors. The validity of its corporate existence can only be tested by proceedings in behalf of the people.. Mead *v.* Keeler, 24 Barb. R. 20. Between the company and strangers, the records of the company will ordinarily be held conclusive against them in regard to such matters as it is their duty to perform, in the manner detailed in the records. Zabriskie *v.* C. C. & C. Railw. 10 Am. Railw. Times, No. 15.

[1] The King *v.* Pasmore, 3 T. R. 200, 240; Ellis *v.* Marshall, 2 Mass. R. 269. This is a charter to certain persons by name, for the purpose of making a street, and subjecting them to assessment for the expense, and it was held not to bind a person named in the act, unless he assented to it.

[2] *Wilmot*, J., in Rex *v.* Vice Ch. of Cambridge, 3 Bur. R. 1647; Rex *v.* Amory, 1 T. R. 575; Falconer *v.* Campbell, 2 McLean, R. 196.

[3] Green *v.* Seymour, 3 Sand. Ch. R. 285.

[4] Charles River Bridge *v.* Warren Bridge, 7 Pick. R. 344, by *Parker*, Ch. J., and *Wilde*, J.

[5] Bank of U. S. *v.* Dandridge, 12 Wheat. R. 64, opinion of *Story*, J., and cases cited.

[6] Coffin *v.* Collins, 17 Maine, 440; Bank of Manchester *v.* Allen, 11 Vt. R. 302; Angell & Ames, Corp. § 81–87; Dartmouth College *v.* Woodward, 4 Wheat. 688; Wilmington & Manchester R. *v.* Saunders, 3 Jones (N. C.) 126.

SECTION III.

ORDINARY POWERS—CONTROL OF MAJORITY.

1. *Ordinary franchises of railways.*
3. *Majority control, unless restrained.*
4. *Cannot change organic law.*
5. *Except in the prescribed mode.*
6. *Cannot accept amended charter.*
7. *Or dissolve corporation.*
8. *May obtain enlarged powers.*
9. *Courts of equity will not restrain the use of their funds for that purpose.*
10. *But will, if to convert canal into railway.*
11. *Right to interfere lost by acquiescence.*
12. *Acquiescence of one plaintiff, fatal.*
13. *Railway a public trust.*
14. *Suit maintained by rival interest.*

§ 20. 1. The ordinary powers of a railway company are the same as those pertaining to other joint-stock aggregate corporations, unless restricted by the express provisions of their charter, or by the general laws of the state. These are perpetual succession, the power to contract, to sue and be sued by the corporate name, to hold land for the purposes of the incorporation, to have a common seal, and to make its own by-laws or statutes, not inconsistent with the charter, or the laws of the state.[1]

2. The right of the majority of a joint-stock company, whether a copartnership or a corporation, to control the minority, is a consideration of vital importance, and will be more extensively discussed hereafter.[2]

3. There can be no doubt the general principle of the right of the majority to control the minority, in all the operations of the company, within the legitimate range of its organic law, is implied in the very fact of its creation, whether expressly conferred or not.[3]

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1 Walford, 69; 1 Black. Comm. 475, 476; 2 Kent, Comm. 277; where the power of amotion of members for just cause is added.

2 *Post*, § 56, 212.

3 Louisville, Cincinnati, & Charleston Railw. *v.* Letson, 2 Howard (U. S.) 497; 15 Curtis, Cond. 193. The very definition of a corporation, that it is an artificial being composed of different members, and existing and acting as an abstraction, and having its habitation where its functions are performed, presupposes that it must act in conformity with its fundamental law, which is according to the combined results of its members, or the will of the majority. But this will cannot change its fundamental law without changing the identity of the artificial being, to which we apply the name of the corporation. See also St. Mary's Church, 7 S. & R. 517; New Orleans, Jackson, &c. Railroad *v.* Harris, 27 Miss. R. 517; *Ex parte* Rogers, 7 Cowen, 526, which holds, that if the charter

*4. And perhaps it is equally implied in the fundamental compact, that the majority have no power to change the organic law of the association, except in conformity to some express provision therein contained.

5. This principle lies at the foundation of all the political organizations in this country, which, in theory certainly, are not liable to be changed by the will of the majority, except in the mode pointed out in the constitution of the state or sovereignty. And corporations are not subject to the ultimate right of revolution, which is claimed to exist in the state, and which may be exercised by the law of force, which is a kind of necessity, to which all submit, when there is no open way of escape. This could have no application to a commercial company, whose movements are as much under the control of the courts of justice as those of a natural person.

6. And in this country it has been held, that the acceptance, by the majority of a corporation, of an amendatory act, does not bind the minority.[4]

7. And a contract of a manufacturing corporation to employ the plaintiff, a stockholder, during the time for which the corporation is established, that being indefinite, is not released by a majority of the company voting to dissolve the corporation and wind up its concerns, discharging the plaintiff from his employment, and transferring the property to trustees, to pay the debts and distribute the surplus among the stockholders, and giving notice to the executive department of the state, that they claimed no further interest in their act of incorporation.[5]

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requires a certain number to be present, in order to the performance of a certain act, it is requisite that the number remain till the act is complete, and if one depart before, although wrongfully, it will defeat the proceedings.

[4] New Orleans, &c. Railroad *v.* Harris, 27 Miss. R. 517. But this rule will be understood with some limitations. If it be an amendment within the ordinary range of the original charter, giving increased facilities for the accomplishment of the same objects, it may be accepted by the majority, so as to bind the whole company. But if it be a fundamental alteration of the constitution of the company, it must have either the express or implied assent of all the corporators, to make it binding. *Post*, pl. 8, § 56, pl. 3, 7.

[5] Revere *v.* Boston Copper Co. 15 Pick. 351. This case, although put mainly upon the ground of plaintiff's rights being independent of the law of the association, yet incidentally involves the right of the majority of the corporators to change its constitutional law. See also Von Schmidt *v.* Huntington, 1 Cal. 55,

*8. But the English cases seem to suppose, that it is incident to every business corporation to obtain such extension and enlargement of its corporate powers, as the course of trade, and enterprise, and altered circumstances, shall render necessary or desirable, not altogether inconsistent with its original creation.[6]

9. Hence it was held that a court of equity will not, at the instance of a shareholder, restrain a joint-stock incorporated company, whose acts of incorporation prescribe its constitution and objects, from applying, in its corporate capacity, to parliament, and from using its corporate seal and resources, to obtain the sanction of the legislature, to the remodelling its constitution, or to a material extension and alteration of its objects and powers.[6]

10. In one case where the purpose of the company was to apply to parliament for leave to convert part of its canal into a railway, the vice-chancellor granted the injunction against applying any of its existing funds to the proposed object.[7] This is the more common view of the subject in this country, and to a great extent in England.[8]

11. But this right of the minority of the shareholders to interfere, by way of injunction, to restrain the majority from obtaining permission to alter the constitution of the corporation, may undoubtedly be lost by acquiescence.[9] Thus where the share-

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and Kean *v.* Johnson, 1 Stockton, Ch. R. 401, where it is held, that where the charter is granted for a limited time, it must continue in operation till the term expires, unless, perhaps, in case of serious loss, or with the consent of all the corporators, and others having any legal interest in the question.

6 Ware *v.* Grand Junction Waterworks, 2 Russ. & My. 470; (13 Eng. Ch. Rep. 126.) Lord Brougham seems here to suppose, that the right of petition to parliament, for enlargement of powers, is an implied incident of all business corporations, by which the subscribers are bound, unless some express prohibition is inserted in their charter. But the more common implication in this country certainly is, that the original shareholders are not bound by any such alteration, unless such power exists, in terms, in the original charter.

7 Cunliff *v.* Manchester & Bolton Canal Co. 2 Russ. & My. 470, in note. But it is here stated, that a few days afterwards, one Maudsley filed a bill against the same company and for a similar object. The cause was heard on its merits, and the suit dismissed with costs. Any act beyond the scope of the constitution of the company requires the consent of all the members. Burmester *v.* Norris, 8 Eng. L. & Eq. R. 487.

8 *Post*, § 56, 181, 212.

9 Graham *v.* Birkenhead, &c. Railway, 6 Eng. L. & Eq. R. 132; Beman *v.*

* holders knew of the purpose of the directors to apply the funds of the company to the construction of part only of the road, to the abandonment of the remainder, and remained passive for eighteen months, while the directors were applying large sums to the completion of this part only, the court refused to interfere by injunction.[9]

12. And if one of the shareholders, who has acquiesced in the diversion of the funds, be joined in the suit with others who have not, no relief can be afforded.[10]

And there can be no doubt of the soundness of this principle, although the effect of its application may be to produce a fundamental alteration of the constitution of a corporation, and thus to enable them to do what they had no power before to do. But this is only applying to the case the principle of implied consent of all the shareholders, resulting from silence, which is all that is requisite in any case, to legalize the alteration of the charter of a private corporation.

13. It is said in a late case by an eminent equity judge, Vice-Chancellor *Stuart*:[11] "Although, generally speaking"—"there can be no doubt of the soundness of the principle, that the directors and the majority of the company may be restrained from employing money, subscribed for one purpose, for another, however advantageous,"—"and although this is the law as to joint-stock companies, unincorporated and unconnected with public duties or interests, it has not been applied to corporate companies for a public undertaking, involving public interests and public duties under the sanction of parliament; in such cases the court of chancery has permitted the use of the corporate seal, and the moneys of the company, to obtain the sanction of parliament to purposes materially altering the interests of the shareholders, according to the contract *inter se*. This was done in the case of Stevens *v.* South Devon Railway Company."[12] The

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Rufford, id. 106. Lord *Cranworth* says: "This court will not allow any of the shareholders to say, that they are not interested in preventing the law of their company from being violated." Ffooks *v.* London & S. W. R. 19 Eng. L. & Eq. R. 7.

10 Ffooks *v.* London & S. W. R. 19 Eng. L. & Eq. R. 7, opinion of *Stuart*, V. C. and cases cited.

11 Ffooks *v.* London & S. W. R. *supra*.

12 13 Beavan, 48; s. c. 12 Eng. L. & Eq. R. 229.

learned judge therefore concludes, that, although the principle first stated by him may apply to the case of public railway companies in general, "it must be taken to be subject to many qualifications, and requiring much caution and consideration" in its application.

*14. The same learned judge further adds, upon the important subject of such proceeding being taken by one in the interest of a rival company: "It has been suggested that this suit is constituted to serve the purposes of another set of shareholders. If it had been established that the real object of seeking this injunction had been to serve the interests of a rival company, I should have considered that a circumstance of great importance in determining the rights of the plaintiffs to any relief. No doubt it has been held in several cases, that the mere fact that the plaintiffs are shareholders in a rival company is no reason for the court, in a proper case refusing its aid, to prevent the violation of contracts. But when the fact is established, that, under the pretence of serving the interest of one company, the shareholders in a rival company, by purchasing shares for the purpose of litigation, can make this court the instrument of defeating or injuring the company into which they so intrude themselves, in order to raise questions and disputes on matters as to which all the other members of the company may be agreed, I cannot consider that in such a case it is the province of this court ordinarily to interfere. In questions on the law of contracts, where there is a discretionary jurisdiction in this court, circumstances affecting the condition of the contracting parties, and the origin and situation of their rights in relation to the subject-matter of the contract, deserve great consideration."

SECTION IV.

MEETINGS OF COMPANY.

1. *Meetings, special and general.*
2. *Special, must be notified as required.*
3. *Special and important matters, named in notice.*
4. *Notice of general meetings need not name business.*
5. *Adjourned meeting, still the same.*
6. *Company acts by meetings, by directors, by agents.*
7. *Courts presume meetings held at proper place.*

§ 21. 1. By the English statutes meetings of railway companies are distinguished as "ordinary" and "extraordinary."

That distinction, in this country, is expressed by the terms, general and special. Ordinary meetings are the annual and semi-annual meetings of the company, and such others as are held at stated times, and for defined objects, according to the provisions of the charter and by-laws; and extraordinary meetings are such as are held by special call of the directors, or other officer, whose duty it is made *to call meetings of the company, in certain contingencies usually defined by the statutes.[1]

2. Notice of special meetings must be issued in conformity to the charter and statutes of the corporation, and where no special provision exists, must be given personally to every member.[2]

3. Notice of special meetings should ordinarily specify the general purpose and object of the call. But it is said this is not indispensable, when it is for the transaction of ordinary business, and that giving security for the debt of a bank, by mortgage of its real estate, is of this character.[3] But where the business is unusual and important, as the election, or amotion, of an officer, the making of by-laws, or other matter affecting the vital interests and fundamental operations of the corporation, and on a day not appointed for the transaction of business of this character, or of all business of the corporation, the notice must state the business, or the action upon it will be held illegal and void.[4]

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[1] 8 & 9 Vict. c. 16, § 66.

[2] Wiggin *v.* Freewill Baptist Society, 8 Met. R. 301. This view seems to be countenanced by Lord *Kenyon*, in Rex *v.* Faversham, 8 T. R. 352; Rex *v.* May, 5 Burrow, 2681; The King *v.* Langhorn, 4 Ad. & Ellis, 538. See, also, cases cited in the argument of this case. But all the cases agree, that if the members attend even without notice, it is sufficient; The King *v.* Theoderic, 8 East, 543. A meeting may be general for most purposes, and also special for a particular purpose; Cutbill *v.* Kingdom, 1 Exch. R. 494.

[3] Savings Bank *v.* Davis, 8 Conn. 191.

[4] Rex *v.* Doncaster, 1 Burrow, R. 738; Angell & Ames, § 488–496. In the case of Zabriskie *v.* C. C. & C. Railw., before the District Court for the Northern District of Ohio, 10 Am. Railw. Times, No. 15, this subject is discussed by Mr. Justice *McLean*, and he concludes, that where the question to be determined by the company was the guaranty of the bonds of a connecting railway to a large amount, under the statute of the state, which required the consent of a meeting of the shareholders, in which two thirds of the capital stock should be represented, it was indispensable, that the call for the meeting should state the business to be transacted, and should be given long enough before the time of the meeting to enable the remotest shareholders in the country to obtain notice and be able to attend, or communicate with their agents, or proxies, and also to enable the resi-

4. But, as a general rule, it may be safely affirmed, perhaps, that in regard to general meetings of the company, which are for the transaction of all business, no notice of the particular business to be done is necessary.[5]

5. The adjournment of a general meeting is not a special meeting, but the mere continuance of the general meeting, and requires no notice of the business to be transacted.[5]

6. By the English statutes, railways may act in either of three modes: First, By the general assembly of the shareholders, which, as between them and the directors and other agents of the company, has supreme control of its affairs. Second, By its directors. Third, By its duly constituted agents.[6] The same general principle is applicable in this country, and at common law.

7. And where the by-laws require the meetings of the company *to be held at a particular place, as the counting-house of the company, and the record, or evidence, does not show that the meetings were held at a different place, it will be presumed they were held at the place designated.[7]

SECTION V.

ELECTION OF DIRECTORS.

1. *Should be at general meeting, or upon special notice.*
2. *Shareholders may restrain their authority.*
3. *Company bound by act of directors,* de facto.
4. *Act of officer* de facto, *binds third persons.*

§ 22. 1. The election of directors is regarded as more important to the interests of the company than most other business, inasmuch as, when duly elected, they hold office for a considerable term, and have all the powers of the corporation in regard to the transaction of its ordinary business, unless specially restrained. They should, therefore, be elected at the regular meetings of the company, and even vacancies should not properly

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dent agents of foreign shareholders to communicate with the owners. This seems but a just and reasonable limitation upon the power of corporations, in regard to special meetings.

[5] Warner *v.* Mower, 11 Vt. R. 385; Wills *v.* Murray, 4 Exch. R. 843.

[6] Walford on Railways, 70.

[7] Daniels *v.* Flower Brook Man. Co. 22 Vt. R. 274.

be filled at special meetings, unless special notice of that particular business had been given according to the laws of the company, which include its charter and statutes, and the general laws of the state applicable to the subject.

2. The shareholders may, in a proper assembly, pass statutes, general or special, which shall control the directors, as between them and the company.[1] Where the by-laws of the company *require notice of the meeting for electing directors, but do not specify the time or mode of such notice, it must be given according to the requirements of the general statutes of the state upon the subject.[2]

3. But the company cannot object that its directors who have acted as such, were not elected at a meeting properly notified.[3]

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[1] But where the charter vests the control of the concerns of the company in a select board or body, the shareholders at large have no right to interfere with the doings of these, their charter agents. Commonwealth *v.* Trustees of St. Mary's Church, 6 Serg. & R. 508; Dana *v.* Bank of the United States, 5 Watts & Serg. 223, 247; Conro *v.* Port Henry Iron Co. 12 Barb. 27. And courts are always reluctant to interfere with the conduct of directors of a corporation, even at the instance of a majority of the shareholders, and ordinarily will not, when such directors have acted in good faith. State *v.* The Bank of Louisiana, 6 Louis. R. 745.

But in Scott *v.* Eagle Fire Co. 7 Paige, R. 198, it was held, that the directors of a joint-stock corporation may be compelled to divide the actual surplus profits of the company among its stockholders from time to time, if they neglect or refuse to do so, without any reasonable cause. But if they abuse their power to make dividends of surplus profits, by dividing the unearned premiums received by them, without leaving a sufficient fund, exclusive of the capital stock, to satisfy the probable losses upon risks assumed by the company, it seems they will be personally liable to such creditors of the company, if, in consequence of extraordinary losses, the company should become insolvent so as to be unable to pay its debts.

[2] Matter of Long Island Railroad, 19 Wend. 37; 2 Am. Railw. C. 453.

[3] Sampson *v.* Bowdoinham Steam Mill Co. 36 Maine, 78. Where persons have acted as directors of a railway company, the court will not summarily inquire into the validity of their appointment. *Tindal*, C. J., said, "If the shareholders allow parties to act as directors, it may be they have no right to turn round in a court of justice and say, that such parties were not properly elected." The Thames Haven Dock & R. Co. *v.* Hall, 5 Man. & Gr. 274–286. In a late case, Port of London Assurance Company's case, 35 Eng. L. & Eq. R. 178, one registered insurance company, agreed to sell its business to another registered insurance company, and a deed of assignment was accordingly executed, whereby the latter company covenanted to indemnify the former against all claims. After the business had been carried on for some time by the purchasing company, that

Where the charter fixes the number of directors, and vacancies occur, the act of the board is not thereby invalidated, provided a quorum still remains.[4]

4. An election of directors will not be set aside, because the inspectors of the election were not sworn as required by the statute. This statute is merely directory, and so far as third persons are concerned, it is sufficient that the inspectors were elected and entered upon the duties of the office, and became officers *de facto*.[5]

*SECTION VI.

MEETINGS OF DIRECTORS.

1. *All should be notified to attend.*
2. *Adjourned meeting still the same.*
3. *Board not required to be kept full.*
4. *Usurpations tried by shareholders or courts.*
5. *Usage will often excuse irregularities.*
6. *Decisions of majority valid.*

n. 8. *Records of proceedings, evidence.*

§ 23. 1. As a general rule, where corporate powers are vested in certain members, whether the whole body of the shareholders, the directors, or a committee, and the general laws of the state, the charter of the company, or the corporate statutes, contain no directions in regard to assembling the body, it is requisite to give due legal notice to each member. Accordingly, when, by the

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company failed, and both companies were wound up under the Winding-up Acts. On the official manager of the selling company tendering a proof against the purchasing company, in respect of claims satisfied by the selling company, one part of the deed of assignment was produced having affixed to it the seal of the purchasing company, but another part, alleged to have been executed by the selling company, was not forthcoming.

Held, first, that after what had taken place, it was unnecessary to determine whether the selling company had executed the purchase-deed, or whether its directors had exceeded their powers in making the sale.

Secondly, that where a purchaser has enjoyed the subject-matter of a contract, every presumption must be made in favor of its validity.

Thirdly, that if all the proceedings on the part of the directors of the purchasing company, with reference to the purchase, had not been in strict accordance with their own deed of settlement, still, if the contract with the other company was the means of the purchasing company coming into existence, they could not act in contravention of that contract.

[4] Walford on Railw. 71, 72; Thames Haven R. *v.* Rose, 4 M. & Gr. 552.

[5] Matter of Mohawk & Hudson R. 19 Wend. 135; 2 Am. Railw. C. 460.

rules of a friendly society, the power of electing officers was vested in a committee of eleven, at a meeting of the committee, where ten of the members were present, the eleventh not having received notice, and the defendant was removed from the office of treasurer, and the plaintiff appointed in his stead by a majority of votes, it was held that the election was void, although the absent committee-man had, for a considerable period, absented himself from the meetings, and intimated an intention not to attend any more, and although the defendant himself had demanded a poll at the election, and was now objecting to its validity.[1]

2. But an adjourned general meeting of directors, which is provided for by the general regulations of the board, and is for the transaction of the general business of the company, requires no special notice of either time or place, or of the business to be transacted.[2]

*3. But where the charter of a railway provides that its business shall be carried on under the management of twelve directors, to be elected in a particular mode, pointed out, and that where vacancies shall occur it shall be lawful for the remaining directors to fill them, it was held that this provision did not require that the board should be always full; but was merely directory, as to the mode of filling vacancies.[3]

4. Where it is complained that the existing board of directors have usurped their places in violation of the wishes of the majority of the shareholders, the question should be referred to a

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[1] Roberts *v.* Price, 4 C. B. 231. In the course of the argument, *Cresswell*, J., referred to The King *v.* Langhorn, 4 Ad. & Ellis, 538, and in giving his opinion said: "This case seems to me directly applicable." In a late case in the House of Lords, Smith *v.* Darley, 2 H. L. Cases, 803, it is said: "The election being by a definite body, on a day, of which, till summons, the electors had no notice, they were all entitled to be specially summoned; and if there were any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance, as, for instance, abroad, there could not be a good electoral assembly; and even an unanimous election by those who did attend, would be void." *Post*, § 211; Great Western R. *v.* Rushout, 10 Eng. L. & Eq. R. 72.

[2] *Ante*, § 21. Wills *v.* Murray, 4 Exch. 843. But see Reg. *v.* Grimshaw, 10 Q. B. 747.

[3] Thames Haven Dock and Railway Co. *v.* Rose, 4 Man. & Gr. 552; *ante*, § 21; Wills *v.* Murray, 4 Exch. 843.

meeting of such shareholders,[4] or it may be tried upon a *quo warranto*.[5]

5. But in practice, in this country, it is believed that most of the routine business of railway and other joint-stock commercial companies is transacted through the agency of sub-committees of the board of directors, and that, where the voice of the board is taken, it is more commonly done without any formal assembly of the board. And long established usage as to particular companies, in regard to the mode of conducting an election, has been held of binding force in regard to such company.[6] And the same course of reasoning might induce courts to sanction a practice, which had become universal from its great convenience, although not strictly in accordance with the principles of the decided cases upon analogous subjects, or the results of *a priori* reasoning.

6. The decision of a majority of the board of directors is usually regarded as binding upon the company; and the assembling of a majority, as a legal quorum for the transaction of business, unless the charter or by-laws contain some specific provision upon the subject;[7] and that notice to the absent *directors will be presumed unless the contrary appears. The general rule upon this subject is, that the act of a majority of a body of public officers is binding; but *that if they be of private appointment*, all must act, and, in general, all must concur, unless there is some provision to accept the decision of a majority. In this respect, railway directors come under the former head certainly. The proper distinction upon the general subject seems to be,

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[4] *Post*, § 211.

[5] *Post*, § 204.

[6] Attorney-General *v.* Davy, cited 1 Vesey, sen. 419. It would savor of bad faith to allow the business of the company to be transacted in a particular mode, and then to attempt to repudiate the acts of their agents, because the transaction proved disadvantageous, when they were in a condition to take the benefit of it if it proved successful.

[7] Cram *v.* Bangor House, 3 Fairfield, 354; Sargent *v.* Webster, 13 Met. 497; 2 Kent's Comm. 293 and notes; The King *v.* Whitaker, 9 B. & C. 648; Commonwealth *v.* Canal Commissioners, 9 Watts, 466; *Ex parte* Wilcocks, 7 Cowen, 402; Field *v.* Field, 9 Wend. 394, 403, where it is held, that in regard to the body of the stockholders, any number who attend is a quorum for doing business, if the others be properly summoned. But as to the directors, it is requisite that a majority attend. 2 Kent, Comm. 293; Cahill *v.* Kalamazoo Ins. Co. 2 Doug. (Mich.) R. 124; Holcomb *v.* N. H. D. B. Co. 1 Stockton, Ch. R. 457.

that where the matter is of public concern, and of an executive or ministerial character, the act of the majority of the board will suffice, although the others are not consulted. But where the function is judicial, involving a determination of some definite question, the whole body must be assembled and act together. If the matter is of public concern, the decision of a majority will bind; but in private concerns, as arbitrations, all must concur.[8]

*SECTION VII.

QUALIFICATION OF DIRECTORS.

1. *One cannot be a contractor and director.*
2. *May be their banker and director.*
3. *May be director by virtue of stock mortgaged.*
4. *Bankruptcy or absence will not vacate office.*
5. *Company compelled to fill vacancies in board.*

§ 24. 1. By the Companies' Clauses Consolidation Act,[1] it is provided, that no person interested in any contract with the company shall be a director, and no director shall be capable of being interested in any contract with the company; and if any director, subsequent to his election, shall be concerned in any such contract, the office of director shall become vacant, and he shall cease to act as such. Under this statute it was held, that, if a director enters into a contract with the company, the contract is not thereby rendered void, but the office of director is vacated.[2]

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[8] Green *v.* Miller, 6 Johns. R. 38; The King *v.* Great Marlow, 2 East, 244; Battye *v.* Gresley, 8 East, 319; Rex *v.* Coln. St. Aldwins, Burr. Settl. Cas. 136; The King *v.* Winwick, 8 T. R. 454. But it has never been held that the entire board of directors must assemble; it is enough if all be summoned, and a majority attend. See note 7. Edgerly *v.* Emerson, 3 Foster, 555. If the doings of directors are not recorded, they may be proved by parol. Ib. The president has a right to vote upon all questions to be determined by the president and directors. McCullough *v.* Annapolis & Elk Ridge R. 4 Gill, 58.

The records of the clerk of a railway company, of the proceedings of the directors, in making calls, may be used as evidence by the company in suits for calls, against one who subscribed for shares, and was one of the grantees of the charter and a director at the time of making such calls, and who had exercised the rights of a shareholder from the first. White Mountain R. *v.* Eastman, 34 N. H. R. 124.

[1] 8 & 9 Vict. c. 16.

[2] Foster *v.* Oxford W. & W. R. 14 Eng. L. & Eq. R. 306. This case is dis-

2. But it has been held, that being a member of a banking company, who were the bankers and treasurers of the railway, and who, as such, received and gave receipts for calls, and paid checks drawn by the directors, will not disqualify one from acting as director, but that this clause only applied to such contracts as were made with the company in the prosecution of its enterprise.[3]

3. Where the qualification of a director consisted in owning a certain number of the shares, the qualification is not lost by a mortgage of the shares.[4]

4. Neither the bankruptcy nor absence of a director, and voluntarily ceasing to act as such, will put an end to his character of director, unless it be so provided in the deed of settlement.[5]

5. If shareholders are dissatisfied with the board of directors not being full, that may be a ground of applying for a mandamus to compel the company to complete the number.[6]

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* CHAPTER V.

PREROGATIVE FRANCHISES.

1. *Control of internal communication in a state a prerogative franchise.*
2. *Such a grant confers powers pertaining exclusively to sovereignty, as taking tolls, and the right of eminent domain.*

§ 25. 1. Railways possess also many extraordinary powers or franchises which partake more or less of the quality of sovereignty, and which it is not competent for the legislature even, to delegate to ordinary corporations. These are sometimes called

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cussed in a later case in the House of Lords. Aberdeen Railway *v.* Blakie, 23 Law Times, 315.

3 Sheffield, Ash. & Man. Railw. *v.* Woodcock, 7 M. & W. 574; 2 Railw. C. 522.

4 Cumming *v.* Prescott, 2 Y. & Coll. Eq. Exch. 488.

5 Phelps *v.* Lyle, 10 Ad. & Ellis, 113. But if one abscond from his creditors the office is thereby vacated. Wilson *v.* Wilson, 6 Scott, 540.

6 Thames Haven Dock & Railway *v.* Rose, 3 Railw. C. 177, 4 Man. & Gr. 552. *Maule*, J. Mozly *v.* Alston, 1 Phillips, 790. By the Lord Chancellor.

the prerogative franchises of the corporation. They exist in banks, which practically supply the currency of the country, or its representative, and railways, which have already engrossed the chief business of internal communication in this country, and almost throughout the civilized world. And both currency and internal communication between different portions of a state are exclusively the prerogatives of sovereignty.

2. In saying that it is not competent for the legislature to confer prerogative franchises upon all corporations, nothing more is intended than that these prerogative franchises do not appertain to all the operations of business, and must therefore of necessity be limited to those persons, whether natural or artificial, which are occupied in matters of a sovereign or prerogative character, and which thus render an equivalent for the franchises conferred.[1] This subject will be discussed more in detail under the titles of Tolls and Eminent Domain.

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* CHAPTER VI.

BY-LAWS AND STATUTES.

SECTION I.

POWER OF MAKING BY-LAWS OR STATUTES.

1. *May control conduct of passengers.*
2. *Must be reasonable and not against law.*
3. *Power may be implied, where not express.*
4. *Not required to be in any particular form unless by special provision.*
6. *Model code of by-laws framed by board of trade in England.*
7. *Company may demand higher fare, if paid in cars.*
8. *Public statutes control by-laws.*
9. *Cannot impose penalty.*
10. *Cannot refuse to be responsible for baggage.*

§ 26. 1. It is incident to all corporations to enact by-laws or

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[1] State *v.* Boston, Concord, & Montreal R. Co. 25 Vt. R. 442, 443. But the right to build and use a railway, and take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature. But it is competent for the legislature to confer this

statutes for the control of its officers and agents, and to regulate the conduct of its business generally. And in the case of railways this includes the regulation of the conduct of passengers and others who are in any way connected with them in business, although not their agents.

2. This power is subject to some necessary limitations. Such by-laws must not infringe the charter of the company or the laws of the State, must not be unreasonable, and must be within the range of the general powers of the corporation.[1]

3. By-laws in violation of common right are void.[2] The power to make by-laws is usually given in express terms in the charter. And where such power to make by-laws is given in the charter upon certain subjects to a limited extent, this has been regarded as an implied prohibition beyond the limits expressed upon the familiar maxim, *Expressum facit cessare tacitum.*[3]

4. By-laws, unless by the express provisions of the charter or general statutes of the state, are not, in this country, required to be enacted or promulgated in any particular form, but only to be enacted at some legal meeting of the corporation. But in England it is generally considered requisite that by-laws be made under the common seal of the corporation, and that in regard to railways, by-laws affecting those who are not officers or servants of the company should have the approval of the Board of Trade or Railway Commissioners.[4]

5. By many of the special railway charters in England, and by the Companies' Clauses Consolidation Act of 1845, it is provided that railway companies may make by-laws under their common

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franchise upon a foreign corporation, so as to enable it to take land for the purpose of constructing a public improvement in the state. Morris Canal & Banking Co. *v.* Townshend, 24 Barb. R. 658. And what title shall be acquired by such foreign corporation, and whether the proposed amendment will be likely to prove beneficial to the citizens of the state, is a question solely within the discretion of the legislature. Ib.

1 Elwood *v.* Bullock, 6 Q. B. 383; Calder Navigation Co. *v.* Pilling, 14 M. & W. 76; Child *v.* Hudson Bay Co. 2 Peere Wms. 209; Angell & Ames, c. 10; 2 Kent, Comm. 296; Davis *v.* Meeting H. in Lowell, 8 Met. 321.

2 Hayden *v.* Noyes, 5 Conn. 391; Adley *v.* The Whitstable Co. 17 Vesey, 315; Clark's case, 3 Coke, 64. When the penalty of a by-law is imprisonment, it is void as against Magna Charta. But such power may be given by statute.

3 Child *v.* Hudson B. Co. 2 Peere Wms. 209.

4 Walford, 249; Hodges, 552, 553.

seal "for the purpose of regulating the conduct of the officers and servants of the company, and for the due management of the affairs of the company in all respects whatever." And they have power to enforce such by-laws, by penalty, and by imprisonment for the collection of such penalty. But a by-law requiring a passenger, not producing, or delivering up his ticket, to pay fare from the place of the departure of the train, was held not to be a by-law, imposing a penalty, and therefore not justifying the imprisonment of such passenger.[5]

6. The statute requires a copy of such by-laws to be furnished every officer and servant of the company, liable to be affected thereby. The code of by-laws framed by the Board of Trade in England, for the regulation of travel by railway, and generally adopted there, is certainly very judicious; and if some similar one could be adopted, and enforced here, it would accomplish very much towards security, sobriety, and comfort, in railway travelling, and tend to exempt the companies from much annoyance and very often from loss.[6]

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[5] Chilton *v.* London & Croydon R. 16 M. & W. 212; 5 Railw. C. 4. *Parke*, B., says, "This is not the case of a penalty, but the mere demand of a fare. Any passenger who does not, at the end of his journey, produce his ticket, may have broken his contract with the company, and be liable to pay his full fare from the most remote terminus. But this is not a penalty or forfeiture, under section 163, giving a right to arrest for non-payment of a penalty or forfeiture." See, also, the opinion of *Rolfe*, B., from which it appears that the by-law was considered valid.

[6] Hodges, 553. "1. No passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to show when required by the guard in charge of the train, and to deliver up before leaving the company's premises, upon demand, to the guard or other servant of the company duly authorized to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started.

"2. Passengers at the road stations will only be booked conditionally, that is to say, in case there shall be room in the train for which they are booked; in case there shall not be room for all the passengers booked, those booked for the longest distance shall have the preference; and those booked for the same distance shall have priority according to the order in which they are booked.

"3. Every person attemping to defraud the company, by riding in or upon any of the company's carriages, without having previously paid his fare, or by riding in or upon a carriage of a higher class than that for which he has booked his place, or by continuing his journey in or upon any of the company's carriages,

*7. In a recent case in Vermont, it was held, that railway companies have the power to make and enforce all reasonable regulations, in regard to the conduct of passengers and to discriminate between fares paid in the cars, and at the stations, and to remove all persons from their cars, who persist in disregarding such regulations, in a reasonable manner and proper place, although between stations.

8. But this may be controlled as to existing railways even, by *general legislation of the state. And where a statute gave all railways the power to remove those who violated any of the by-laws or regulations of the company from their cars, *at the regular stations*, this was held to carry an implied prohibition from removing such persons at other points.[7]

9. But it has been held, that a general power to make by-laws for the regulation of the use of a canal, will not justify the proprietors in closing the navigation of the canal on Sundays,[8]

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beyond the destination for which he has paid his fare, or by attempting in any other manner whatever to evade the payment of his fare, is hereby subjected to a penalty not exceeding forty shillings.

"4. Smoking is strictly prohibited both in and upon the carriages, and in the company's stations. Every person smoking in a carriage is hereby subjected to a penalty not exceeding forty shillings; and every person persisting in smoking in a carriage or station, after being warned to desist, shall, in addition to incurring a penalty not exceeding forty shillings, be immediately, or, if travelling, at the first opportunity, removed from the company's premises, and forfeit his fare.

"5. Any person found in the company's carriages or stations in a state of intoxication, or committing any nuisance, or otherwise wilfully interfering with the comfort of other passengers, and every person obstructing any of the company's officers in the discharge of their duty, is hereby subjected to a penalty not exceeding forty shillings, and shall immediately, or, if travelling, at the first opportunity, be removed from the company's premises and forfeit his fare.

"6. Any passenger cutting the linings, removing or defacing the number-plates, breaking the windows, or otherwise wilfully damaging or injuring any of the company's carriages shall forfeit and pay a sum not exceeding £5 in addition to the amount of damage done."

"*Note.*—Persons wilfully obstructing the company's officers, in cases where personal safety is concerned, are liable, under the 3 & 4 Vict. c. 97, section 16, to be apprehended and fined £5 with two months imprisonment in default of payment.

7 Stilphin *v.* Smith, 29 Vt. R. See late case in New Hampshire, in which it is held, railways may lawfully discriminate between fare paid in the cars and at the stations. Hilliard *v.* Goold, 34 N. H. R. 230, *post*, n. 17. *Post*, § 160.

8 Calder Nav. Co. *v.* Pilling, 14 M. & W. 76; 3 Railw. C. 735. But it is ques-

nor in making by-laws subjecting the shares to forfeiture for non-payment of calls, unless that power is expressly given by the charter or by statute.[9]

10. And a by-law declaring that the company would not be responsible for a passenger's baggage, unless booked and the carriage paid for, is bad, as inconsistent with the general law, allowing railway passengers to carry a certain amount and kind of baggage.[10]

SECTION II.

BY-LAWS REGULATING THE USE OF STATIONS AND GROUNDS.

1. *May exclude persons without business.*
2. *May regulate the conduct of others.*
3. *Superintendent may expel for violation of rules.*
4. *Probable cause will justify.*
5. *In civil suit must prove violation of rules.*

§ 27. 1. Questions have sometimes been made, in regard to the right of railway companies to exclude persons from their grounds, who had no business to transact there, connected with the * company, or to establish regulations or by-laws to govern the conduct of such persons as had occasion to come there, and to exclude others. But, upon the whole, there seems little ground to question the right.[1]

2. A railway corporation has authority to make and carry into effect reasonable regulations for the conduct of all persons using the railway, or resorting to its depots, without prescribing such regulations by formal by-laws; and the superintendent of a railway station, appointed by the corporation, has the same authority, by delegation.

3. Such superintendent may exclude from the stations and

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tionable whether this case is maintainable, in this country, upon any such grounds.

[9] Matter of Long Island Railw. 19 Wend. 37; 2 Am. Railw. C. 453.

[10] Williams *v.* Great Western Railway, 28 Eng. L. & Eq. R. 439. But it seems somewhat questionable, whether the principle of this decision can ultimately be maintained. It seems to be no unreasonable abridgment of the right of a passenger to carry a certain weight and kind of baggage, to require it to be booked and carriage paid.

[1] Barker *v.* Midland Railw. 36 Eng. L. & Eq. R. 253; Commonwealth *v.* Power, 7 Met. R. 596; 1 Am. Railw. C. 389; Hall *v.* Power, 12 Met. 482.

grounds persons who persist in violating the reasonable regulations prescribed for their conduct, and thereby annoy passengers, or interrupt the officers and servants of the company in the discharge of their duty. Thus, where the entrance of innkeepers and their servants into a railway station to solicit passengers to go to their houses, produces such effect, they may be excluded from coming within the station; and if after notice of a regulation to that effect, they attempt to violate it, and after notice to leave, refuse to do so, they may be forcibly expelled by the servants of the company, using no unnecessary force.

4. And where an innkeeper had been accustomed to annoy passengers in this manner, and had been informed by the superintendent of the station that he must do so no more, but still continued the practice, and afterwards obtains a ticket for a passage in the cars, with the *bona fide* intention of entering the cars as a passenger, and goes into the station on his way to the cars, and the superintendent believing he had entered for his usual purpose, orders him to go out, and he does not exhibit his ticket, nor give notice of his real intention, but pushes forward towards the cars, and the superintendent and his assistants remove him from the station, using no unnecessary force, the removal is justifiable,[2] and not an indictable offence.[2]

5. But the superintendent cannot remove a person from the stations and grounds of the company, merely because such person, in the judgment of the superintendent, and without proof of the fact, violated the regulations of the company, or conducted himself *offensively towards the superintendent.[3] And it was said if such person is removed for an alleged violation of the regulations of the company, and it finally is shown that he did not in fact violate any of such regulations, he may recover damages of the superintendent of the station by whose order he was removed, notwithstanding such superintendent acted in good faith.[3] And in such case, it is not competent to show that the plaintiff had been guilty of former violations of other regulations of the company.[3]

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2 Commonwealth *v.* Power, 7 Met. R. 596; Markham *v.* Brown, 8 N. Hamp. R. 523.

3 Hall *v.* Power, 12 Met. R. 482, 1 Am. Railw. C. 410. There is an apparent discrepancy in the manner of stating the point of the decision of this case, and that of The Commonwealth *v.* Power, 7 Met. R. 596, in regard to defendant

*SECTION III.

BY-LAWS, AS TO PASSENGERS.

1. *By-laws as statutes.*
2. *As mere rules, or regulations.*
3. *Requiring larger fares, for shorter distances.*
4. *Requiring passengers to go through in same train.*
5. *Arrest of passenger, by company's servants.*
7. *Company liable for act of servant.*
8. *By-law must be published.*
9. *Excluding merchandise from passenger-trains.*
10. *Discrimination between fares paid in cars and at stations.*
11. *Liability for excess of force.*

§ 28. 1. A distinction is sometimes made between by-laws,

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being justified, if he acted in good faith, upon probable cause, which does not seem to be warranted, by any recognized distinction, between a civil suit, for damages, and a public prosecution for assault and battery, but the court evidently intend no distinction in the cases. The law is well stated, by *Shaw*, Ch. J., in the former case, 7 Met. 602: "We are therefore of opinion, that upon the evidence detailed in the judge's report, the jury should be instructed in a manner somewhat as follows: That if Power had been placed in charge of the depot by the corporation, as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management: That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railroad, or having occasion to resort to the depots, for any purpose: That this power was properly to be executed by a superintendent, adapting his rules and regulations to the circumstances of the particular depot under his charge; and that it was not necessary that such regulations should be prescribed by by-laws of the corporation: That the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage, or landing from the cars, amounts in law to a license to all persons, *primâ facie*, to enter the depot, and that such entry is not a trespass; but that it is a license conditional, subject to reasonable and useful regulations; and, on non-compliance with such regulations, the license is revocable, and may be revoked either as to an individual, or as to a class of individuals, by actual or constructive notice to that effect: That if the platform, as part of the depot, is appropriated to and connected with the entrance of passengers into the cars, and the exit of passengers from the cars, and for the accommodation of their baggage, and if the soliciting of passengers to take lodgings in particular public-houses, by the keepers of them or their servants, is a purpose not directly connected with the carriage of passengers by the railroad, on their entrance into or exit from cars; that if, when urged with earnestness and importunity, it is an annoyance of passengers, and interruption to their proper business of taking or leaving their seats in the cars, and procuring or directing the disposition of their baggage; or if the presence of such persons, for such a purpose, is a hinderance and interruption to the officers

and orders, or regulations, the former being supposed, in strictness of language, to have reference exclusively to the government of their own members, and of their corporate officers.[1] And it is true that such other ordinances, as any owner of the buildings and grounds, *about a railway station, employed in carrying passengers, might find it convenient to establish, are certainly not what is ordinarily understood, by the by-laws, or statutes, of the corporation.

2. But in the English cases they are both called by-laws.[2]

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and servants of the corporation, in the performance of their respective and proper duties to the corporation, as passenger-carriers; then the prohibition of such persons from entering upon the platform, is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked; and if, upon notice to quit the depot, he refuses so to do, he may be removed therefrom by the superintendent and the persons employed by him; and if they use no more force than is necessary for that purpose, such use of force is not an assault and battery, but is justifiable: that as to the circumstances of the present case, if the superintendent had issued a circular, giving notice to all innkeepers and landlords, that he had prohibited them from entering the depot to solicit persons to go to their respective houses as guests, and if this notice came to Hall, and he afterwards, and after special notice to him personally, had attempted to violate this prohibition, and solicit passengers; and if, upon the particular occasion, he gave no notice of coming for any other purpose; and if the defendant Power met him on his way to the platform, told him he must not go there, laid his hands on him, and ordered him to leave the depot, without any inquiry as to the purposes of Hall, and Hall made no reply, but pressed forward and attempted to reach the platform, in spite of the efforts of Power; this was strong *primâ facie* evidence that he was going there with intent to solicit passengers, in violation of the notice and revocation of license; and that if he gave no notice of his intention to enter the car as a passenger, and of his right to do so; and if Power believed that his intention was to violate a subsisting reasonable regulation; then he and his assistants were justified in forcibly removing him from the depot: That if Hall gave no notice of his having a ticket, of his intention and purpose to enter the cars as a passenger, and of his right to do so, and that Power had no notice of it, then Hall could not justify his conduct, and make Power a wrongdoer, by proving the possession of such a ticket, or of his intent to go in the cars to Richmond, as a passenger; and that he was to be considered as standing on the same footing as if he had not possessed such ticket."

1 *Shaw*, Ch. J., in Commonwealth *v.* Power, 7 Met. 601.

2 Chilton *v.* The London & Croydon Rail. 5 Railw. C. 4. It would seem from the opinion of *Parke*, B., that the by-law was regarded as valid, but as imperfect, in not subjecting the passenger to a penalty in terms. The other judges doubted whether the act was intended to give the company power to imprison the plaintiff,

Thus a by-law, that each passenger, on booking his place should be furnished with a ticket, to be delivered up before leaving the company's premises, and that each passenger, not producing or delivering up his ticket, should be required to pay fare from the place, whence the train originally started, was held not to be a by-law imposing a penalty.[2] And that therefore the non-production of the ticket, with which a passenger had been furnished, and his refusal to pay fare from the place, whence the train started, did not justify his arrest, but only rendered him liable to pay fare from the place whence the train started.

3. But in a late English case,[3] where the company had made a legal by-law, that any passenger, who should enter a carriage of the company, without first having paid his fare, should be subjected to a penalty not exceeding 40*s.*, a passenger, desiring to go to Diss station, where the fare was 7*s.*, procured a ticket for Norwich, a more distant station on the line, but where the fare was but 5*s.*, in consequence of competition, and entered the carriage accordingly, and at Diss offered to surrender his ticket, but refused to pay the difference in fare, he was prosecuted for the penalty, and a majority of the Court of Queen's Bench held he was not liable, on the ground that he had paid his fare before entering the carriage. Lord *Campbell* said, "I cautiously abstain from expressing any opinion, as to the power of the company to make special regulations, or by-laws, so as to enforce larger fares, for shorter distances." "Had not Frere, within the meaning of the by-law, paid his fare, before he entered the carriage? I think he had. He had paid the full fare from Colchester to Norwich, all that was required of him; and he cannot be said to be a person who had entered the company's carriage without payment of fare." [4]

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or any one, except for some offence against the act. But all seemed to concur in the opinion that the passenger was bound to comply with the regulation, or submit to the alternative. State *v.* Overton, 4 Zab. 435.

[3] Reg. *v.* Frere, 29 Eng. L. & Eq. R. 143.

[4] But the argument of Lord *Campbell* on this point does not seem altogether satisfactory. Whether the passenger had paid his fare depended upon the validity of the by-law, and could not be fairly determined upon any other basis, it would seem. Frere had paid fare to Norwich, but had not paid fare to Diss, unless the by-law was void; so that the validity of the by-law did seem to be necessarily involved in the decision. And the decision of the court, although not professing to do so, did virtually disregard it. For if the by-law was valid, Frere

*4. It has been held that a regulation requiring passengers to go through, in the same train, and that if one do not, requiring fare for the remainder of the route is valid.[5]

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had no more paid his fare, than if he had taken a ticket to a station short of his destination. And if the by-law meant any thing sensible, it could only mean, having paid fare to his destination. Any other construction looks like an evasion.

[5] Cheney *v.* Boston & Maine Railw. 11 Met. 121; 1 Am. Railw. C. 601. In this case the passenger, when he bought his ticket, did not know of the regulation, but was informed of it in the cars, and his money offered to be refunded, deducting what he had travelled; but he refused to make the arrangement, and demanded his ticket, in exchange for the check which had been given him, marked "good for this trip only." He stopped by the way, and went on the same day in the next train; and when he presented his check, it was refused, and fare demanded, which he was obliged to pay. The court held the passenger could not recover the money of the company, and that it made no difference whether the plaintiff were aware of the regulation or not, at the time he purchased his ticket. He was bound to inform himself, or accept of the ticket, for what it entitled him to demand, by the rules of the company.

This subject is a good deal discussed in a late case in New Jersey, and a similar result arrived at. It is there said that the company may discriminate between way and through fare, unless prohibited by law. State *v.* Overton, 4 Zab. 434. In Pier *v.* Finel, 24 Barb. 514, where a person was put off the cars of a railway company, for refusal to pay fare, having, and offering to the conductor, a ticket of the company, dated a few days before, and marked "good for this trip only," but unmutilated, as was the practice of the conductors, upon that road, where a ticket had been used; it was held, that the ticket was *prima facie* evidence that the holder had paid the regular fare for it, and of his right to be transported, at some time, between the places specified, on some passenger train; and if unmutilated, the presumption was, that it had never been used, and that it imposed upon the company the duty to so transport the holder.

It was also held that the indorsement, "good for this trip only," had reference to no particular trip, or any particular time, but only to some one continuous trip. That the passenger might demand a passage, as well on a subsequent day, as the one upon which the ticket bore date, and was issued.

This decision seems to us, not precisely to meet the whole question involved in the case, that is, whether such a regulation, as was claimed to be evidenced by the ticket, and the indorsement, was a valid and binding regulation. There can be no doubt such a regulation exists, upon many of the roads, in this country, and that such a ticket is understood, by the community generally, as entitling the holder only to a passage on that day, at most, if not in the very next train.

We very readily perceive that the form of the ticket is susceptible of the construction put upon it by the court. But as we are satisfied, that is not the intention of those who issue such tickets, or of those who buy them, as a general thing, we should have been gratified to see the main question grappled with.

We do not intend to intimate any question of the general soundness of the views expressed in this case, upon what we regard as the true construction of the

5. In one case,[11] where the plaintiff, upon the information of the station-clerk that he might return at a given hour upon an

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ticket. We are inclined to think they are sound. For it seems to us to be contrary to the first principles of justice and equity, that if the passenger is, for sufficient cause delayed, or hindered from going, according to his expectation, at the time he pays his fare, that he should thereby lose all benefit of the payment, when he does desire to go. The company may not be bound to refund the money, but they certainly are bound, upon general principles, to allow the holder of the ticket the benefit of his unused portion of it, deducting of course any loss, or inconvenience to them, by reason of the contract not being carried into effect, according to its terms. And any regulation of the company, which should deprive the passenger of this benefit, would operate a forfeiture, which no court of justice will favour, where the passenger is not in fault. It seems, in principle, to be controlled by the rule of law applied to work done upon the company's road, but not according to the contract, and which nevertheless the company are benefited by, to a certain extent. In such cases the company must pay for the work, at its value to them, that is, deducting all losses, in consequence of it not being done as stipulated. *Post*, § 113, pl. 4, p. 204.

So also if the passenger refuse to surrender his ticket in exchange for the conductor's check, according to the regulations of the company, and at any point of the route leave the cars, without surrendering his ticket, he is liable to pay fare for the distance he rode, or upon his refusal to surrender his ticket, or to pay fare, the conductor is justified in expelling him from the cars. Northern Railroad *v.* Page, 22 Barb. 130. In Hibbard *v.* New York & Erie Railway, 1 Smith, 455, New York Court of Appeals, it was held, that a regulation, made by a railway company, requiring passengers to exhibit their tickets, whenever requested by the conductor, and directing those who refused to do so, to be expelled from the cars, was reasonable and valid, and that passengers were bound to conform to it, and forfeited all right to be carried further, by refusal to do so. And it was further held, that the binding force of such a regulation was matter of law to be decided by the court, and that under such a regulation, where a passenger refused, on request, to exhibit his ticket a second time, the train having in the mean time passed a station, it was error in the court to charge the jury, that the passenger was bound to exhibit his ticket, when reasonably requested, and that if the conductor knew he had paid his fare he had no right to expel him from the cars.

It is intimated in this case, that one who has thus forfeited his right, cannot regain it, by exhibiting his ticket after the train is stopped for the purpose of putting him off. And also, that the *company* would not be liable if the conductor put a wrong construction upon the regulation, and thus wrongfully expelled a passenger, or if he were guilty of an excess of force. But see § 169, *post*.

[11] Roe *v.* Birkenhead, Lancashire, and Cheshire Junction Railw. 7 Eng. L. & Eq. R. 546; 6 Railw. C. 795. And it has been held that a steamboat proprietor might exclude one from his boat, while employed in carrying passengers, if such person was the agent of a rival line of stages to that which, by contract with the proprietor, carried in connection with his boats, the plaintiff's object being, at the time, to solicit passengers to go by the rival line of stages; and the jury having

*excursion-ticket, purchased such ticket and took the train named by such clerk to return, but the train did not pass through; and at the place where it stopped the station-clerk demanded 2*s.* 6*d.* more, saying he should not have taken that train, payment being refused, the superintendent took the plaintiff into custody. The plaintiff's attorney having written the secretary of the company, asking compensation, he requested to be furnished with the date of the transaction, and promised to make inquiries. He also stated verbally that it was an awkward business, and the blame would fall upon the station-clerk who gave the plaintiff the false information, and offered to return the 2*s.* 6*d.* It was held that, as there was no evidence of the authority of the defendants to make the arrest, and none of their having expressly or impliedly authorized or ratified it, it must be regarded as the mere tortious act of the servant.[11]

6. But in a somewhat similar case,[12] in the Exchequer Chamber, where the plaintiff below had been taken into custody by a railway inspector of the defendants, charged with having no ticket, refusing to pay fare, intoxication, and assaulting the inspector, at the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings; and it was held that such attendance was no ratification by the company, it not appearing that the facts were known to the company. These cases afford more latitude for corporations to escape from liability for the acts of their agents and servants, while employed in the prosecution of their business, than is common in this country.[13]

7. But there are many cases in this country where it has been

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found that the contract was *bonâ fide* and reasonable, and not entered into for the purpose of an oppressive monopoly, and that the regulation excluding plaintiff was necessary in order to carry the contract into effect. Jencks *v.* Coleman, 2 Sumner, 221. But a contract not to carry passengers coming by a particular line will not excuse the carrier from carrying such passenger. Bennet *v.* Dutton, 10 N. H. 481.

[12] The Eastern Counties Railway *v.* Broom, 2 Eng. L. & Eq. R. 406; 6 Railw. C. 743.

[13] *Post*, § 225 and notes. See also *post*, §§ 160, 169. And in Coppin *v.* Braithwaite, 8 Jurist, 875, it is said to have been ruled by *Rolfe*, B., at Nisi Prius, that a carrier having received a pickpocket as a passenger on board his vessel, and taken his fare, he cannot put him on shore at any intermediate place, so long as he is guilty of no impropriety.

held that trespass will not lie against a corporation for the act of their agents;[14] but this is not the prevailing rule here, where the servant acts within the apparent scope of his authority, and where his acts would bind the principal, being a natural person.

8. An English railway company[15] having power by statute to *make by-laws which were to be painted upon a board and hung up at the stations, and to be binding upon all parties, made, among others, a by-law that "first class passengers shall be allowed one hundred and twelve pounds, and second class passengers fifty-six pounds luggage each, and that the company will not be responsible for the care of the same unless booked and paid for accordingly." It did not appear that the plaintiff knew of the by-law, or that it had been posted up as required. The plaintiff became a passenger, and gave his luggage to the servants of the company, and it had been stolen. It was held that the company were liable, unless they showed the by-law hung up at the stations, as required by the statute, or else brought home to the knowledge of the plaintiff.

9. A by-law excluding merchandise from the passenger-trains, and confining its transportation to the freight-trains, was held reasonable. The company are not bound to carry a passenger daily upon his paying fare, when his trunk, or trunks, contain merchandise, money, and other valuable matter known as "express matter."[16]

10. In a very recent case[17] in Connecticut, it was held, by a

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14 Philadelphia G. & N. Railw. Co. *v.* Wilt, 4 Wharton, 143; 2 Am. Railw. C. 254; Orr *v.* Bank of U. States, 1 Ohio, 36; Foote *v.* City of Cincinnati, 9 Ohio, 31.

15 Great Western R. *v.* Goodman, 11 Eng. L. & Eq. R. 546.

16 Merrihew *v.* Milwaukie & Mississippi R. (Wis.) 5 Law Reg. 364.

17 Crocker *v.* New London, Willimantic & Palmer Railw. 24 Conn. R. 249. The court were so nearly equally divided in the decision of this case, that it cannot be regarded as much authority, in itself. The leading propositions in the text were maintained, by the Chief Justice and one other judge, and dissented from by two other judges.

The only point of doubt seems to be the duty of the company, in making such discrimination, to give reasonable opportunity to passengers to obtain tickets, at the lowest rate of fare, which seems just and reasonable, and in accordance, we believe, with the generally received opinion upon the subject, and the one we should have been inclined to adopt. In Hilliard *v.* Goold, 34 N. H. R. 230, it was held, that a uniform discrimination between fares paid in the cars, and at the stations, not exceeding five cents, was reasonable and legal, and a passenger who

divided court, that where a railway company established and gave notice of a discrimination of five cents, between fares paid in the cars, and at the stations, the regulation was valid, and that where a passenger refused to pay the additional five cents in the cars, the conductor might lawfully put him out of the cars, using no unnecessary force. Upon the trial of an action, for such expulsion, it was held that the plaintiff was not entitled to recover upon proof, that he went to the ticket-office of the company, a reasonable time before the train left, to procure a ticket; that the office was closed, and so remained till the train departed, and that he so informed the conductor, before his expulsion from the cars.

* The following propositions are maintained in the opinion of the court: —

1. That the defendants, as common carriers, were under no legal obligation to furnish tickets, or to carry passengers for less than the sum demanded, if the fare was paid in the cars.

2. That the plaintiff's claim rested solely upon the assumption, that the defendants had undertaken to carry for the less sum, on certain conditions, which they had themselves defeated.

3. That the regulation did not constitute a contract, but a mere proposal, which they might suspend, or withdraw at any time.

4. That such proposal was withdrawn by closing the defendant's office, and the retirement of their agent therefrom.

5. The proposition being withdrawn the parties were in the same condition as before it was made; the defendants continuing common carriers were bound to carry the plaintiff for the usual fare, paid in the cars, and not otherwise.

6. That the plaintiff, refusing to pay such fare, was properly removed from the cars.

It was further held by all the judges that if the plaintiff was wrongfully removed from the cars, he might lawfully reënter them, and if in attempting to do so he received the injury complained of, he was entitled to recover, unless he was himself guilty of some want of care, which produced, or essentially contributed to produce, the injury.

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had not procured a ticket, and refused to pay the additional five cents demanded of him, for fare paid in the cars, was liable to be expelled.

But if the expulsion was lawful, or if the plaintiff was guilty of want of care, as stated, he could not recover.

The majority of the court also held, that if any of the defendant's employees, which the conductor called to his aid, in putting and keeping the plaintiff off the cars, intentionally kicked the plaintiff in his face, without the knowledge or direction of the conductor, the defendants are not liable for the act, in trespass.

11. There is no question upon general principles, in an action, or indictment, against the conductor of a railway train, for unlawfully expelling a passenger, where the evidence shows a right to make the expulsion, the conductor may nevertheless become liable for the manner of doing it. This is a question to be determined by the jury, and cannot ordinarily be decided, by the court, as matter of law. If there be an excess of force, or it be applied in an unreasonable and improper manner, the conductor is liable for such excess, to respond in damages, to the party, and also to public prosecution, for a breach of the peace.[18]

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*CHAPTER VII.

CAPITAL STOCK.

SECTION I.

LIMITATIONS.

1. *General rights of shareholders.*
2. *Capital stock not the limit of property.*
3. *Cannot mortgage, unless on special license of the legislature.*

§ 29. 1. All joint-stock companies are allowed to raise a certain amount, and sometimes an indefinite amount of capital, by the subscription of the members; the corporation, in fact, generally consisting of the contributors of stock, and their assignees, which is divided into shares, transferable according to the by-

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[18] Hilliard *v.* Goold, 34 New H. R. 230. State *v.* Ross, 2 Dutcher, 224. In this last case the principal evidence of excess was, that the conductor kicked a passenger who, in a state of intoxication, persisted in attempting to get upon the train, and the court held the conviction proper.

laws and charter of the corporation, entitling the owner, for the time being, to the rights of voting, either in person or by proxy, as a general thing, and to a participation in the profits of the enterprise.[1]

2. The capital stock of a corporation is not necessarily the limit of its property.[2] It is not uncommon for charters of stock companies to contain restrictions and limitations in regard to their right or capacity to hold real estate, and sometimes even in regard to personal estate.

3. But railway companies, being created for the purpose of carrying into effect a definite enterprise, must almost of necessity have the power to issue sufficient stock to accomplish the undertaking, or to raise the requisite funds in some other mode, as by loan and mortgage. And when the stock is limited, and often where it is not, these corporations have been compelled, either to abandon the enterprise, or to resort to loans and mortgages, which * being in some sense a desperate mode of raising funds, as long as the company have power to issue stock, could only be justified ordinarily by a strict and fatal necessity, and by permission of the legislature, as is generally considered.[3]

SECTION II.

CONDITIONS PRECEDENT, WHICH THE PUBLIC AUTHORITIES MAY ENFORCE.

1. *Stock, if limited, must all be subscribed.* | 2. *Payments at time of subscription.*

§ 30. 1. If, by the charter, the stock of the company is divided into a certain number of shares, that number cannot be changed by act of the company.[1] And if the charter either expressly or by legal intendment require, that a certain number of shares be subscribed before any assessment is laid, no valid assessment can be laid until that number be *bonâ fide* subscribed, and if it is attempted the company may be dissolved.[2]

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1 Walford on Railways, 252.

2 Barry *v.* Merchants' Exchange Co. 1 Sandford's Ch. R. 280; South Bay Meadow Dam Co. *v.* Gray, 30 Maine R. 547.

3 *Post*, § 181, 234, 235.

1 Salem Mill-Dam Co. *v.* Ropes, 6 Pick. R. 23.

2 Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; Central Turnpike Co. *v.* Valentine, 10 Pick. R. 142. Where the capital stock consists of a given number of

2. And where the general law of the state, or the particular charter, requires a given proportion of subscriptions to be paid in at the time of subscription, this condition must be complied with, or the subscriptions will not fulfil the condition precedent.[3] Where *the charter of a railway company provided that the whole capital stock should be subscribed, before any of the powers and provisions of the charter should be put in force, and the company made a call upon the shares before the subscriptions were completed, and commenced an action after they were so, it was held the action could not be maintained, the completion of the subscription being necessary, to enable the company to make the call.[4]

SECTION III.

SHARES PERSONAL ESTATE.

1. *Railway shares personal estate at common law.*
2. *Not an interest growing out of land, or goods, wares, and merchandise.*
3. *Early cases treated such shares as real estate.*

§ 31. 1. The shares of railway companies are now almost universally regarded as personal estate. The English statute so

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shares of given amount, no valid assessment for the general purposes of the enterprise can be made until the whole number of shares is subscribed; and if any of the subscriptions be made upon conditions precedent, it must be shown that such conditions have been waived or performed. 10 Pick. 142. But assessments to defray the expenses of the incorporation, organization, and preliminary examination, similar to those under the provisional companies in England, have been allowed to be made before the stock of the company is all subscribed. 6 Pick. 23.

[3] Highland Turnpike Co. *v.* M'Kean, 11 Johns. R. 98, 1 Caines's Cas. 85. But see *post*, § 51, where it will appear, that although the public, or the other shareholders, may insist upon the payment, in money, of the sums required by the charter to be paid at the time of subscription, this is a condition which cannot be taken advantage of by the subscriber, as between himself and the company, in an action for calls. And it has been held, that the stock subscriptions to a railway, with banking privileges, cannot be paid in bills of the company, but must all be paid in specie. King *v.* Elliott, 5 Sm. & M. 428. The charter in this case required $20 paid in specie at the time of subscription. Subscriptions in the name of infants, unless some one is responsible for payment of calls, are not a compliance with the charter. Roman *v.* Fry, 5 J. J. Marshall, 634. But if the corporation acquiesce in such subscriptions, they cannot afterwards object. Creed *v.* Lancaster Bank, 1 Ohio St. R. 1.

[4] Norwich and Lowestoffe Navigation Co. *v.* Theobold, 1 M. & M. 151. It is

declares them. Hence the transfer of such shares is not required to be in writing, as coming within the acts of mortmain.[1] This has been repeatedly decided in regard to shares of canal and dock companies, and bonds secured by an assignment of the rates.[2] Such shares may be sold by parol where the contract is executory.[3] * And it would seem that the same view would prevail in the English courts, even where there is no statutory declaration, that the shares shall be deemed personal estate.[3]

2. And the sale of foreign railway shares standing in the name of another person, and a guaranty that such person shall deliver, need not be in writing, either as having respect to an interest growing out of land, or as an undertaking for another, the undertaking being original and not collateral.[4] Railway shares are neither an interest in land, nor goods, wares, and merchandise, within the statute of frauds.[5]

3. Some of the early English cases treated the shares of incorporated companies as real estate, where the interest grew out of the use or improvement of real estate,[6] and a similar view is taken in some of the American states.[7] But the settled rule

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not competent for all the shareholders to reduce the amount of the capital stock, by mutual consent, below that fixed in the charter. If that is attempted, it will be enjoined upon a bill brought by the company against the shareholders and projectors. Society of Practical Knowledge *v.* Abbott, 2 Beavan, 559.

1 Ashton *v.* Lord Longdale, 4 Eng. L. & Eq. R. 80. This case extends the same rule to the debentures of such companies. Neither is railway scrip within the Mortmain Act. But mortgages given by a railway company of the undertaking and tolls may be within the act. So also shares in a bank secured by mortgages. Myers *v.* Perigal, 16 Simons, 533; The King *v.* Chipping Norton, 5 East, 239.

2 Sparling *v.* Parker, 9 Beavan, 450; Thompson *v.* Thompson, 1 Coll. C. C. 381; Hilton *v.* Gerard, 1 De G. & S. 183; Walker *v.* Milne, 11 Beavan, 507. But see Tomlinson *v.* Tomlinson, 9 id. 459.

3 Bradley *v.* Holdsworth, 3 M. & W. 422; Bligh *v.* Brent, 2 Y. & Coll. 294. This is an elaborate case establishing the proposition that the shares in a corporation, whose works are real estate, are nevertheless personal estate, and this upon general principles of the common law.

4 Hargraves *v.* Parsons, 13 M. & W. 561.

5 Humble *v.* Mitchell, 2 Railw. C. 70; s. c. 11 Ad. & Ellis, 205. See also Duncuft *v.* Albrecht, 12 Simons, 189; Tempest *v.* Kilner, 3 C. B. 249; Knight *v.* Barber, 16 M. & W. 66.

6 Drybutter *v.* Bartholomew, 2 Peere Wms. 127; Townsend *v.* Ash, 3 Atk. 336; Buckerridge *v.* Ingram, 2 Vesey, jr. 652.

7 Welles *v.* Cowles, 2 Conn. 567. See also Cape Sable Company's case, 3

upon the subject now, both in England and this country, is that before stated.[8]

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*CHAPTER VIII.

TRANSFER OF SHARES.

SECTION I.

RESTRICTIONS UPON TRANSFER.

1. *Express provisions of charter to be observed.*
2. *If not made exclusive, held directory merely.*
3. *Unusual and inconvenient restrictions void.*
4. *But a lien upon stock for the indebtedness of the owner is valid.*
5. *But such lien is not implied.*
6. *Where transfer is wrongfully refused, vendee may recover value of the company.*

§ 32. 1. We cannot here attempt to show in detail all the incidents of the transfer of stock in railway companies. It is trans-

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Bland's Ch. R. 670; Binney's case, 2 id. 99; Price *v.* Price, 6 Dana, 107; Meason's Estate, 4 Watts, 346.

8 Walford, 254; *ante*, § 31, and cases cited in notes 1, 2, 3, and 4; Tippets *v.* Walker, 4 Mass. R. 596, opinion of *Parsons*, Ch. J., speaking of a turnpike company, he says: "When the road is made, the corporation is entitled to demand and receive a toll of travellers for the use of it, in trust for the members of the corporation, in proportion to their respective shares. The property of every member is the right to receive a proportional part of the tolls, which is considered as personal estate."

In Howe *v.* Starkweather, 17 Mass. R. 243, *Parker*, Ch. J., says: "Shares in a turnpike or other incorporated company, are not chattels. They have more resemblance to choses in action, being merely evidence of property."

In 1 Greenleaf's Cruise, 39, 40, the subject is very fully and fairly presented, and the following conclusion arrived at, in regard to the state of the law in the United States: "Latterly it has been thought that railway shares were more properly to be regarded as personal estate."

The same view is held in Bank of Waltham *v.* Waltham, 10 Met. 334; Hutchins, Adm'r, *v.* The State Bank, 12 Met. 421; Denton *v.* Livingston, 9 Johns. R. 100; Planters Bank *v.* Merchants' Bank, 4 Alabama, 753; Union Bank of Tennessee *v.* The State, 9 Yerger, 490; Brightwell *v.* Mallory, 10 id. 196; Heart *v.* State Bank, 2 Dev. Ch. 111; State *v.* Franklin Bank, 10 Ohio, 91, 97; Slaymaker *v. Gettysburgh Bank, 10 Barr, 373; Gilpin *v.* Howell, 5 Barr. 57; Johns *v.* Johns, 1 Ohio St. R. 351; Arnold *v.* Ruggles, 1 Rhode Island Rep. 165.

A distinction has sometimes been attempted between the shares of a bank or

ferable much the same as other personal property, excepting only that any express provision of the charter upon that subject must be regarded as of paramount obligation.[1]

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manufacturing corporation, and a turnpike or railway, in regard to their partaking of the realty. But the slightest examination will satisfy us, that there is no substantial ground for any such distinction. The one may be more intimately connected, in its existence or operation, with real estate, but both must have some connection, more or less intimate, and in both the shareholders have no title to the land, that residing altogether in the corporation, while the shares are merely a right to the ultimate profits of the company, and are as really and unquestionably choses in action as promissory notes, bills of exchange, or bonds and mortgages, of natural or corporate persons. Wheelock *v.* Moulton, 15 Verm. R. 519; Isham *v.* Ben. Iron Co. 19 Verm. R. 230. See also Johns *v.* Johns, *supra.*

[1] Strictly speaking, perhaps no shares in any joint enterprise are transferable so as to introduce the assignee into the association, as a member, unless it be joint-stock companies and corporations, formed in pursuance of legislative authority. And in the case of legislative incorporations, the shares are transferable only under the charter, and according to its terms. Duvergier *v.* Fellows, 5 Bing. R. 248, 267, opinion of *Best*, Ch. J. A mere partnership cannot be so constituted, as to release the assignor of a share from all liability to third persons, and introduce the assignee at once, and completely, into his place. Blundell *v.* Winsor, 8 Simons, 601, opinion of *Shadwell*, V. C.; Jackson *v.* Cocker, 4 Beavan, 63.

In the English courts it has been held, that where the charter of a corporation or the deed of settlement required the assent of the directors to complete the title of the purchaser of shares, that it was the duty of the seller to procure this assent, in order to comply with his contract to convey. Wilkinson *v.* Lloyd, 7 Q. B. 27; Bosanquet *v.* Shortridge, 4 Exch. 699.

And all corporations may, in self-defence, require all calls made upon their stock to be paid, before they will substitute the name of the purchaser of shares upon their books, for the original subscriber, as after this substitution they have no longer any claim upon such subscriber, and it would be liable to defeat many public enterprises of moment, and after large expenditures had been incurred, if the subscribers could, at will, relieve themselves from all liability to pay calls, by transferring their shares to irresponsible persons. Hall *v.* Norfolk Estuary Co. 8 Eng. L. & Eq. R. 351. But the assignee of a share may always insist upon becoming a member upon paying all calls.

Questions of some difficulty often arise between shareholders and the company, in regard to an informal transfer having been confirmed by acquiescence. In Shortridge *v.* Bosanquet, 17 Eng. L. & Eq. R. 331, and in *ex parte* Bagge, 4 Eng. L. & Eq. R. 72, it is held that if the entry of the transfer is made upon the books of the company, and especially where the company have dealt with the shareholder claiming under the transfer, they cannot treat the transaction as void, for any want of form in the transfer, though in a matter specially required by the charter and not immaterial, but which their own irregularities had rendered it impossible to observe. And where the secretary of a joint-stock company fraudu-

*2. In many cases, however, where the charter only provides a mode of transfer, and does not declare this mode exclusive of all others, the provision has been regarded as merely directory, and

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lently transferred shares, and the proprietor of the shares treated the transaction as being valid against the transferree, but filed a bill against the company for damages, it was held he was not entitled to relief. Duncan *v.* Luntley, 2 McN. & Gord. 30; 2 Hall & Twells, 78.

In *ex parte* Straffon's Executors, 10 Eng. L. & Eq. R. 275, the lord chancellor, *St. Leonards*, thus characterizes these transactions, which, although informal in some respects, are constantly acquiesced in by both parties, until there comes some crisis in the affairs of the company, perhaps, or the transferree becomes insolvent. "There would be no safety for mankind in dealings of this kind, extensive as they are, with so much money embarked in them, if the courts had ever held, as they never have held, that every minute circumstance must be obeyed, which the directors themselves ought to have obeyed; but if they disregard them, if the shareholders do not call them to account for doing so, if a course of action has been adopted in the particular company, without complaint, although they may have arrived at making a man a shareholder, by what I should call a short cut, instead of going through all the necessary formalities, they may be perfectly good as between parties thus dealing with the directors, and the directors themselves, so as to bind them."

And in Bargate *v.* Shortridge, 31 Eng. L. & Eq. R. 44, (May, 1855,) in the house of lords, upon elaborate argument and great consideration, it seems to have been definitively settled in England, that where the deed of a joint-stock company required the certificate of consent of three directors to the transfer of the shares of the company, and in practice this had never been given, but, for ten years, transfers had continually been made upon the verbal assent of the managing director upon the spot, and about nine tenths of the original shares had been transferred in this manner, and S. having transferred his shares in the same mode to T., and his name having been entered upon the books of the company, they could not afterwards refuse to regard T. as a member.

And in such case, where the directors afterwards cancelled the name of T. in their share register-book, on the ground that the consent of the directors was wanting, it was held that S. had ceased to be a member of the company, and was entitled to an injunction against a *scire facias* prayed out against him by a creditor of the company, as a shareholder.

It was said by Lord *St. Leonards*, who delivered the leading opinion: "Where the directors of a company do acts in a matter in which they have no authority, such acts are altogether null and void. But where the acts are within their power and duty, and are either omitted or improperly done, and thereby third parties are damaged, neither a court of law nor of equity will allow the company to take advantage of their neglect."

This, it seems to us, is a sound distinction, and one which will have an important bearing upon the fraudulent over-issue of stock by the directors of a company whose capital is limited, and all issued and in the hands of *bonâ fide* owners. This is the same case in 4 Exch. 699. See also Taylor *v.* Hughes, 2 Jones &

*not indispensable to the vesting of title in the assignee. And this has generally been so regarded, where the express provisions, in relation to the transfer of shares, exist only in the by-laws of the corporation.

3. And any unusual restriction in the by-laws of a corporation upon the transfer of stock, as that it shall be made only upon the books of the corporation, in person, or by attorney, and with the consent of the president, or other officers of the corporation, has been regarded as void, as an unreasonable restraint upon trade,[2] unless as a provision to secure the indebtedness of shareholders. *In such case it is sometimes said the assignee need only make

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La Touche, 24; Humble *v.* Langston, 2 Railw. C. 533; *Ex parte* Cockburn, 1 Eng. L. & Eq. R. 139.

But where the charter, or the general law, requires all debts of the owner to be paid the company before transfer of shares, the company are not bound to accept a transfer otherwise made. Reg. *v.* Wing, 33 Eng. L. & Eq. R. 80.

[2] Sargeant *v.* Franklin Ins. Co. 8 Pick. R. 90; Quiner *v.* Marblehead Ins. Co. 10 Mass. R. 476; Noyes *v.* Spalding, 27 Vt. R. 421; Bates *v.* New York Ins. Co. 3 Johns. Cas. 238; Chouteau Spring Co. *v.* Harris, 20 Missouri Rep. 382. In this last case the charter of the company provided that the stock might be "transferred on the books of the company," and the company were authorized "to regulate the transfer of stock," by by-laws. And a provision in the charter authorized the company, in certain cases, to make assessments of *stockholders* beyond their shares of stock.

It was held that no such assessment could be made on a party, after he had ceased to be a member, by a transfer of his stock. That the power "to regulate the transfer" did not include the power to restrain transfers, or to prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them, and that the company could not prevent a party from selling his stock, even to an insolvent person.

That an assignment "upon the books of the company" was sufficient to effect a change of ownership, without taking out a new certificate in the name of the assignee; and that any transfer in writing was valid against the company, if, being notified, they refused to allow it to be made according to their by-laws.

And in Dauchy *v.* Brown, 24 Vt. R. 197, which was an action against stockholders, upon the proper debt of the corporation, where the charter provided, that the persons and property of the corporation shall be holden to pay its debts, and that any execution, which should issue against the corporation, might be levied upon the person, or property, of any individual thereof, it was held, that the stockholders were only liable, in default of the corporation, and that judgment should first be recovered against the corporation, and the statute remedy strictly pursued. See, also, in regard to the remedy against stockholders, who are by statute made personally liable, Southmayd *v.* Russ, 3 Conn. 52; Middletown Bank *v.* Magill, 5 Conn. 28; Child *v.* Coffin, 17 Mass. R. 64; Roman *v.* Fry, 5 J. J. Marshall, R. 634.

his right known to the company, and require the transfer entered upon the books and his title becomes perfected.[3]

4. But if the former owner was indebted to the corporation, and the charter required all such indebtedness to be liquidated, before transfer of stock, such indebtedness will remain a lien upon the stock, in the hands of the assignee.[4]

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[3] Sargeant *v.* Franklin Ins. Co. 8 Pick. 90; United States *v.* Vaughan, 3 Binney, R. 394; Ellis *v.* Essex Bridge Co. 2 Pick. 243; Chester Glass Co. *v.* Dewey, 16 Mass. R. 94; Agricultural Bank *v.* Burr, 11 Shepley, 256; Same *v.* Wilson, id. 273.

[4] Union Bank *v.* Laird, 2 Wheaton, R. 390; Bank of Utica *v.* Smalley, 2 Cowen, R. 770; Rogers *v.* Huntington Bank, 12 Serg. & R. 77; Downer *v.* Bank of Zanesville, Wright (Ohio) R. 477; Farmers Bank of Maryland *v.* Iglehart, 6 Gill, R. 50; Hall *v.* U. S. Insurance Co. 5 Gill, 484. See Angell & Ames, § 355 and note. In Marlborough M. Co. *v.* Smith, 2 Conn. 579, it was said the transfer of shares to constitute the assignee a stockholder must be in strict conformity to the charter and by-laws. And in the recent case of Pittsburg & Steubenville Railw. *v.* Clark, 9 Am. Railway Times, 51, Ch. J. *Lewis* goes into an elaborate review of the cases to show, that under the Pennsylvania statutes, which provide, that no transfer of shares shall be made while the holder remains indebted to the company, except by consent of the board of directors, and no transfer shall discharge any liabilities before incurred, that both the stock and the holder remain liable for all calls due before the transfer, and that the original subscriber, who promised to pay fifty dollars on a share, is indebted to the company, before calls made, within the meaning of the statute; and even where the transfer is made with the consent of the directors, will remain liable until all calls are paid, notwithstanding the statute subjects the transferee also to a like liability. The following extract from the opinion of the learned judge places the points decided in a clear light: "Is an original subscriber who has bound himself in writing to pay fifty dollars per share, but who has only paid five dollars per share on his subscription, 'indebted' to the company within the meaning of the act? Why should this question receive a negative answer? His engagement to pay money is as much a debt as any other engagement for the payment of money. A debt may be contracted for stock in a railroad company as readily as for any thing else. It is true that the debt is payable by instalments when required from time to time by the directors. But it is none the less a debt on that account. It is *debitum in presenti solvendum in futuro*. It is a present debt payable at some future day. It is well settled that the lien given by statute to a corporation, upon the shares of stockholders '*indebted*' to it, extends to *all* debts, whether payable presently or at a future time, except where the statute limits the lien to debts actually due and payable, and that a stockholder indebted to the corporation, although the debt may not be due, cannot transfer his stock without the consent of the corporation. Rogers *v.* Huntingdon, 12 S. & R. 77; Grant *v.* Mechanics' Bank of Philadelphia, 15 S. & R. 140; Sewell *v.* Lancaster Bank, 17 S. & R. 285. It is very clear that the defendants, at the time of the

5. A corporation has no implied lien upon stock for the liabilities of the stockholders to the company.[5]

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alleged transfer of their stock, were 'indebted' to the company to an amount nearly equal to the whole of their subscription. They had, therefore, no right whatever to transfer their stock without the consent of the board of directors. It is true that as between them and the purchaser, if the latter thought proper to contract for a contingent or uncertain interest, the transfer might be good for some purposes. 8 Pick. 90; 9 Pick. 202; 2 Cowen, 770. But it passes no title to the stock, and confers no 'privileges, immunities, or franchises' whatever upon the purchaser. The consent of the board of directors is of itself the originating act in the change of title, and does not merely operate to perfect the conveyance previously begun. Marlborough Man. Co. *v.* Smith, 2 Conn. Rep. 579; Northop *v.* Newtown & Bridgeport Turnpike Co. 3 Conn. Rep. 544; Oxford Turnpike Co. *v.* Bunnell, 6 Conn. Rep. 552. So long as the stock remains unpaid, the corporation has a right to refuse to receive new members in place of the original adventures. Until the stock is fully paid up, and the stockholders otherwise free from debt to the company, they have no right whatever to introduce strangers into the company in their places. A right which depends upon the consent of others, is no right at all. The transfer to Mr. Stanton was therefore, of itself, a nullity. An attempt was made to give it vitality by parol evidence, from which the consent of the board of directors was to be inferred by the jury. But there is no evidence tending to show that the question was ever presented to the consideration of the board, or that any action was taken by the board in regard to the transfer. In ordinary business transactions between a corporation and strangers, the authority of agents and the existence of contracts may be implied from acquiescence and other circumstances. So where the assent of the board is required by a by-law only, the execution of the by-law may be modified by the *practice* of the corporation. Ins. Co. *v.* Smith, 1 Jones, 126. But when the act of incorporation grants a power, the mode prescribed by the statute for its exercise must be strictly pursued. 5 Barb. Sup. Court Rep. 613, 614; 2 Cranch, 127. The question here is whether one member of a corporation has been legally substituted for another. The title of the original stockholder was established by written evidence, and could have no legal existence without it. Thames Tunnel *v.* Sheldon, 6 B. & C. 341. The title of the substitute must be shown by evidence of the same character. It is the duty of the directors to keep minutes of their proceedings, and the proper evidence of their assent to a transfer is a recorded resolution adopted when the board was in session. Where the transfer is made by a director, it ought further to appear that the resolution of assent was carried without

[5] Mass. Iron Co. *v.* Hooper, 7 Cush. 183; Heart *v.* State Bank, 2 Dev. Ch. R. 111; Sargent *v.* Franklin Ins. Co. 8 Pick. 90, and cases cited *supra*, note 2. But dividends due and unpaid may be said to be a fund, in the hands of the corporation, which they are not obliged to pay to the assignee of the stock, until their debts from the assignor are liquidated. Dividends are strictly due only to the assignor, and would not probably pass by a mere sale of the stock, unless there were some special ground for giving the transfer of the stock that operation

6. And where the company wrongfully refuse to record transfers of shares on their books, the vendee may recover the price of such shares, the company having caused them to be sold, as the property of the vendor.[5]

*SECTION II.

CONTRACTS TO TRANSFER STOCK.

1. *Transfer under English statutes. Registered companies.*
2. *Contracts to transfer stock valid, where* bonâ fide.
3. *Vendor must have the stock, when due.*
n. 3. *Vendor must procure the consent of directors, where requisite.*

§ 33. 1. Questions often arise in regard to transfers of stock in incorporated companies, as to the quantity of interest conveyed, the title of the person making the conveyance, and many other incidents. The English statutes in regard to the registration of railway companies are not intended to affect the property in the shares,[1] and a transfer is valid, although made before the registration.[2]

2. It would seem, too, that a contract to transfer stock in rail-

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his vote. If the resolution was adopted and entered on the minutes, the loss or destruction of the entry might be supplied by parol proof. But in no other case can parol evidence be received to show that an assignee has been admitted as a member of the corporation in the place of the assignor. There was no legal evidence of the assent of the board of directors to the transfer, and therefore no legal evidence of a valid transfer of the stock. If there had been, we do not see how the defendants can claim to be discharged by it from 'liabilities' previously incurred. Their subscription to the stock of the company created a *liability* to be called upon for payment in such instalments as the directors required. Conceding that it was not an obligation for *present* payment, and supposing, for a moment, that it was not strictly a *debt*, it was certainly a '*liability*,' which is a word of more extensive signification than 'debt.' The act of assembly is express in its direction that a transfer, even with the assent of the board, shall not have the effect of discharging *any liabilities* or penalties heretofore incurred by the owner of the stock. We see no reason for restricting this *proviso* to 'liabilities' which had become *due* and *payable* before the transfer. It is sufficient to bring a 'liability' within the *proviso* that it had been 'incurred' by the owner before the transfer. It is not necessary that it should also have become due and payable."

[1] The London & Brighton Railway Co. *v.* Fariclough, 2 Railw. Cases, 544; s. c. 2 M. & Gr. 674.

[2] The Sheffield, Ashton-under-Lyne, & Manchester Railw. Co. *v.* Woodcock, 2 Railw. Cases, 522; s. c. 7 M. & W. 574.

way companies, at a future time, which the party neither has, nor is about to have, but expects to purchase in the market, for the purpose of fulfilling his undertaking, is nevertheless a valid contract, and not illegal, or against the policy of the law,[3] and that the intimation of Lord *Tenterden*,[4] that such contracts were illegal, and not to be encouraged by the law or its ministers, is not to be regarded, at this time, as sound law, however good sense, or good morality, it may seem to be.

3. It is clearly not a stock-jobbing transaction within the Eng- *lish statute.[5] But to the performance of such a contract it seems to be requisite, that the seller should *bonâ fide* procure the stock, by the time appointed for the transfer.[6]

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[3] Hibblewhite *v.* M'Morine, 5 M. & W. 462. Mr. Walford in his treatise, 256 and note, intimates, that the law of France regards this class of contracts as illegal, and cites Hannuic *v.* Goldner, 11 M. & W. 849, in confirmation. But the case does not expressly decide the point. That was pleaded, and the court held the plea bad, as amounting to the general issue, and the party had leave to amend. Perhaps it is charitable both to the pleader and to the country, to suppose such is the law there, as Mr. Walford seems to have done. But where the deed of settlement requires the assent of the directors to a transfer of shares, and the vendor did not obtain it, and in the mean time the price of shares fell in the market, held the vendor might recover back his money. Wilkinson *v.* Lloyd, 7 Q. B. 27.

[4] In Byran *v.* Lewis, Ry. & M. 386, and in Lorymer *v.* Smith, 1 B. & C. 1.

[5] Hewett *v.* Price, 4 Man. & G. 355; Mortimer *v.* M'Callan, 6 M. & W. 58.

[6] Hibblewhite *v.* M'Morine, 2 Railw. C. 51–66; s. c. 6 M. & W. 200. The comments of *Isham*, J., in Noyes *v.* Spalding, 27 Vt. R. 429, may be regarded, perhaps, as giving the present state of the English law upon this subject. "Contracts for the sale of stock of this character on time are valid at common law, and can be enforced by action. The statute 7 Geo. 2, ch. 8, made perpetual by 10 Geo. 2, ch. 8, has rendered some contracts of that character illegal. They are rendered void so far as the *public stocks* of that country are concerned, when the seller had no stock at the time of making the contract, and none was ever intended to be transferred by the parties, but their intention was to pay the difference merely that may exist between the market value of the stock at the time of the transfer, and the price agreed to be paid. Such contracts are rendered void by that statute, and are treated as wagering contracts; 'the seller virtually betting that the stock will fall, the buyer that it will rise.' Chitty on Bills, 112, note (w). It has been held, that railroad stock is not within the act. Hewett *v.* Price, 4 Man. & Gran. 355; 3 Railway C. 175; Fisher *v.* Price, 11 Beav. 194. In the case of Mortimer *v.* McCullon, 6 M. & Wels. 69, Lord *Abinger* observed, 'that the act was made for the purpose of preventing what is declared to be illegal trafficking in the funds by selling fictitious stock merely by way of differences; but it never was intended to affect *bonâ fide* sales of stock.' Ellsworth

SECTION III.

INTERVENING CALLS, OR ASSESSMENTS.

1. *Vendor must pay calls, if that is requisite to pass title.*
2. *Generally it is matter of construction, and inference.*

n. 2. *Calls paid by vendor after executing transfer.*

§ 34. 1. It has been said, too, that the contractor to transfer stock must see to it that all calls are met, up to the time of the transfer, as in general the charters of such companies, or their by-laws, prohibit the transfer of stock, while calls remain unpaid.[1] But we have seen, that this is a provision for the protection of the *company, and in which they alone are interested, and which will not ordinarily avoid a sale, between other parties, otherwise valid.

2. And it would seem that the question, upon which party the duty to pay future calls shall rest, is one of construction, in the absence of express stipulation; at all events, one of intention. It may perhaps be safe to say that the sale of stock, in the present tense, ordinarily implies, that it is free from incumbrance of any kind, unless there is some exception, or qualification, in the contract. And that may be the common presumption, in regard to contracts to deliver stock, in future. But in the latter case the presumption is not, by any means, of so conclusive a character, as in the former, and sometimes, in such cases, it has been held not incumbent upon the seller to pay intervening calls.[2]

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v. Cole, 7 M. & W. 30; 2 Kent's Comm. 468, note (b). In the case of Grizewood *v.* Blane, 20 Eng. L. & Eq. R. 290, it was held, that a colorable contract for the sale of railroad shares, where no transfer is intended, but merely '*differences*,' amounting to the rise or fall of the market, it is gaming within the 8 and 9 Vict. ch. 109, § 18; 11 Common Bench R. 538."

[1] Walford, 256, 257.

[2] Shaw *v.* Rowley, 5 Railw. C. 47. In this case it was held no impediment to the seller's readiness to convey the shares, that he had not paid an intervening call, as he might do it, at the moment of executing the transfer, and the court say the call was ultimately to be paid, by the purchaser.

In Humble *v.* Langston, 2 Railw. C. 533, it is decided, that upon the sale and transfer of the shares, where the purchaser's name is not substituted, on the register of the company, for that of the seller, but the stock still standing in his name, he is thereby subjected to the payment of future calls, he cannot recover the

*SECTION IV.

TRANSFER BY DEED IN BLANK.

1 & 2. *Blank transfer formerly held invalid in England.* | 3. *Rule different in America.*

§ 35. 1. Ordinarily the transfer of stock, or a contract to transfer, is not required to be in any particular form. All that is requisite, is, the same as in any other contract, the meeting of the minds of the parties. But in some cases, the shares are, by

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money of the purchaser, because there is no implied contract to that effect, resulting from the transaction. This is certainly a most remarkable decision, and it is something of a task, to be able to read the opinion of the court, by which this result is reached, with tolerable patience. The conclusion is certainly not fortified either by reason or analogy.

And in the Cheltenham & Great W. Union Railway Co. *v.* Daniel, 2 Railw. C. 728, it is decided, that the purchaser of shares may, by way of estoppel *in pais* be made liable for calls, before his name is actually substituted, for that of the seller, upon the register of shares. If so, both parties are liable for the calls, and the seller, while his name remains upon the register, is the mere surety of the purchaser, as to future calls. And what is a more natural or necessary conclusion in the mind of any one having the common sense of justice, than to imply, that while the purchaser suffers the seller's name to remain upon the register, and liable to the payment of calls, through his neglect, he does impliedly promise to indemnify him against all loss on that account? See Burnett *v.* Lynch, 5 B. & C. 589.

But the case of Humble *v.* Langston is reaffirmed in the subsequent case of Sayles *v.* Blane, 6 Railw. C. 79. These cases can only be accounted for, upon the principle of discouraging blank unregistered transfers, which have the effect to evade the stamp duties. Shelford, 108, and Report on Railw. 1839, No. 517, p. 4.

Since writing the above the late case of Walker *v.* Bartlett, 36 Eng. L. & Eq. R. 368, has come to hand, where a blank transfer seems to be regarded as perfectly valid, and that the transfer in this mode does impose upon the vendee the duty of paying calls upon the shares, while they remain his property. We may be allowed to say, that this result of the English decisions, upon this subject, is not altogether without gratification, as the former decisions had so effectually mystified the subject, that it seemed not improbable that the difficulty of comprehending them might very likely be ultimately found with ourselves, rather than at the door of the eminent jurists, who have so long clung to the now acknowledged inconsistency of Humble *v.* Langston, which pertinacity in error, as a general thing, is far more uncommon in Westminster Hall, than with courts of less experience.

Men of the learning and experience of the English judges, generally feel, that they can afford to acknowledge their common share of human fallibility, without serious prejudice.

the express requirements of the charter, made transferable only, by deed executed by both parties to the transfer.

2. And in such case it was considered, that a deed executed by the seller, with a blank for the name of the transferree, was no compliance with the statute.[1] The opinion of the court seems to rest upon the early cases, in which it is held that the party cannot effectually execute a deed, leaving such important blanks, as the name of the grantee, or obligee, while it is considered that less important ones, like the date, etc., may be supplied, after the execution, by permission of the party executing the same. This seems to have been the undoubted rule of the English law, from the authorities cited, in the last case.

3. But it seems to be rather technical, than substantial, and to found itself, either in the policy of the stamp duties, or the superior force and sacredness of contracts, by deed, both of which have little importance in this country. And the prevailing current of American authority, and the practical instincts, and business experience and sense of our people are undoubtedly otherwise.

*4. There is no good reason, why one should not be as much bound, by a deed, executed blank, and filled according to his direction, as by a blank acceptance, or indorsement, of a bill, or note, and accordingly we find a large number of decisions of the American courts, leading in that direction.[2]

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[1] Hibblewhite *v.* M'Morine, 2 Railw. C. 51; 6 M. & W. 200. It is considered that two or more several owners of shares may join in one deed to convey their shares. Wells *v.* Bridge, 4 Exch. 193; Enthoven *v.* Hayle, 9 Eng. L. & Eq. R. 434. See *ante*, § 34, n. 2.

[2] Stahl *v.* Berger, 10 S. & R. 170; Sigfried *v.* Levant, 6 id. 308; Wiley *v.* Moore, 17 id. 438; Graham *v.* Ogle, 2 Penn. 132; Woolley *v.* Constant, 4 Johns. R. 54, 60; *Ex parte* Kerwin, 8 Cow. R. 118; Boardman *v.* Gore *et al.* 15 Mass. R. 331.

And the following certainly incline in the same direction. Smith *v.* Crocker, 5 Mass. R. 538, and the opinion of *Parsons*, Ch. J.; Hunt *v.* Adams, 6 id. 519; Warring *v.* Williams, 8 Pick. 326; Adams *v.* Frye, 3 Met. R. 103; Bank of Commonwealth *v.* Curry, 2 Dana, 142; Bank *v.* McChord, 4 id. 191; Johnson *v.* Bank of the U. States, 2 B. Monroe, 310; Camden Bank *v.* Halls, 2 Green, 583; Duncan *v.* Hodges, 4 M'Cord, 239.

In the London & Brighton Railway Co. *v.* Fairclough, 2 Railw. C. 544, the deed of transfer where one name was first inserted, as transferree, and subsequently that erased, and another inserted, and the deed reëxecuted, by the vendor, was held void, because it had not been restamped.

SECTION V.

SALE OF SPURIOUS SHARES.

1. *Vendor, who acts* bonâ fide, *must refund money.*
3. *No implied warranty in such case, which will entitle the vendee to special damage.*
4. *Rule of the stock-exchange, made after the sale, not binding upon parties.*

§ 36. 1. Where one employed a share-broker to sell in the market what purported to be scrip or certificates of shares in a projected railway company, which subsequently proved to have been forged, and the broker paid the price at which he sold them to the defendant, but being called upon by the purchaser to make good the loss, repaid the money, and a further sum, according to a *resolution of the committee of the stock-exchange, as to the value of genuine shares in the same railway company, which resolution was passed after the sale of the spurious shares. The defendant declining to pay this further sum, the broker brought an action, claiming to recover, as upon a warranty, that the shares were genuine, with a count for money paid.

2. Upon the latter count the defendant paid into court the money received upon the original sale, with interest.

3. It was held, the plaintiff could not recover upon the ground of the warranty, there being no promise, express or implied, that the certificates were genuine; and that under the other count, he could only recover the money paid defendant.

4. It was also held, that the resolution of the committee of the stock-exchange, made after the transaction was completed, how-

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An auctioneer, who sells shares, at public auction, without disclosing the name of his principal, makes himself personally responsible for the fulfilment of the contract of sale. Franklyn *v.* Lamond, 4 C. B. 637; Hodges on Railways, 119.

But where one borrowed money, and deposited certificates of railway shares, with blank assignments upon them, as security, and the blanks were not filled up, till the shareholder became bankrupt, it was held, that the depositary had a lien upon the shares, for money advanced by him, or paid on calls upon the shares. Dobson, *Ex parte*, 2 Mont. D. & De G. 685. And railway bonds issued with the name of the obligee blank, were held negotiable in that form, although not in terms negotiable; and that any holder for value, before the blanks were filled, might maintain an action in his own name against the company. Chapin *v.* Vermont & Mass. Railway, 20 Law Rep. 650, in Supreme Court of Mass.

ever it might bind the members of that body, could not affect the defendant.[1]

SECTION VI.

READINESS TO PERFORM. CUSTOM AND USAGE.

1. *Vendor must be ready and offer to convey.*
2. *Vendee must be ready to pay price.*
3. *General custom and local usage.*
4. *The party taking the initiative, must prepare the writings.*

n. 3. *Oral evidence to explain memoranda of contract.*

§ 37. 1. The obligation resting upon the vendor of railway shares is to have, at the time specified in the contract for delivery, a good title to the requisite number of shares, and to manifest his readiness to convey, which is usually done by tendering the proper conveyance. But this is not necessary. Any other mode of showing readiness is sufficient.[1]

*2. The corresponding obligations upon the vendee are readiness to receive the proper conveyance, at the specified time and place, and to pay the price, and it would seem to prepare a proper conveyance, and tender the same for execution, upon having a good title made out.[2]

3. But the incidents of such contracts are liable to be controlled by general, and local customs, and usages of trade, the same, as other similar contracts.[3] Hence any general known

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[1] Westropp *v.* Solomon, 8 C. B. 345. We think it probable, that the cases, in this country, would be regarded as favoring the view, that upon a sale of this kind, there is an implied warranty, that the article is what it purports to be, and consequently, that the seller is liable to pay its value in the market, at the time its spuriousness is discovered.

Post, Chap. XXXII. It would seem that in England it is an indictable offence for persons to conspire to fabricate shares, in addition to the limited number of shares of which a company consists, in order to sell them, as good shares, notwithstanding any imperfection in the original formation of the company. Rex *v.* Mott, 2 Car. & P. 521; *post*, § 37, n. 3.

[1] Humble *v.* Langston, 2 Railw. C. 533; Hannuic *v.* Goldner, 11 M. & W. 849; Hare *v.* Waring, 3 M. & W. 362; Hibblewhite *v.* M'Morine, 2 Railw. C. 51. In Munn *v.* Barnum, 24 Barb. R. 283, it is held that mere readiness to transfer is sufficient in such cases, and that an actual transfer is never requisite, where the purchaser declines to pay the price.

[2] Lawrence *v.* Knowles, 5 Bing. (N. C.) 399; Stephens *v.* De Medina, 4 Ad. & Ellis, (N. S.) 422; Bowlby *v.* Bell, 4 Railw. C. 692.

[3] Stewart *v.* Cauty, 2 Railw. C. 616; 8 M. & W. 160. And one who employs

usage of those negotiating similar business, and which may be fairly presumed to have been known to the parties, or which

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a share-broker, at a particular place, to purchase shares, is bound by a usage, affecting the broker, at that particular place. As where the plaintiff, a share-broker in Leeds, bought for defendant ten railway shares to be paid for on delivery. The defendant not being ready to pay the money, the vendor made a resale, at a less price, and called upon the plaintiff for the difference, which he paid, without communicating with defendant, all which was done, according to the custom of the Leeds stock-exchange. It was held the plaintiff might recover of defendant the difference, in an action for money paid. Pollock *v.* Staples, 5 Railw. C. 352.

And where shares had been purchased by a stock-broker, upon which a call had been made, but not then due, by the rules of the stock-exchange it was the duty of the vendee to pay the call, the vendor having paid it, to enable him to convey, the broker paid the amount to him, and it was held he might recover it of the vendee, as money paid for his use. Bailey *v.* Wilkins, 7 C. B. 886. And it would seem the party is bound, by such usage, though not cognizant of it. *Parke* and *Rolfe*, BB., in Bayliffe *v.* Butterworth, 5 Railw. C. 283; Sutton *v.* Latham, 10 A. & E. 27.

And where the broker could not obtain the certificate of shares for some months, on account of the delay in having them registered, by the company, and in the mean time a call was made, which he paid, the person for whom he purchased having, from time to time, urged the forwarding of the scrip without delay, it was held that he could not repudiate the contract, and recover the money, advanced to the broker, to pay the price of the purchase. McEwen *v.* Woods, 11 Q. B. 13; 5 Railw. C. 335.

And where the defendant gave the plaintiff, a broker on the stock-exchange, an order to purchase for him fifty shares in a foreign railway company, at a time when no shares of the company were in the market, or had in fact issued, but *letters* of *allotment* were then, according to the evidence of persons on the stock-exchange, commonly bought and sold as shares, and the plaintiff bought for the defendant a letter of allotment of fifty shares, it was held that a jury might well find that this was a good execution of the order. Mitchell *v.* Newhall, 15 M. & W. 368; 4 Railw. C. 300.

And where the broker bought scrip certificates, which were sold in the market, as "Kentish Coast Railway Scrip," and were signed by the secretary of the company, but which were afterwards repudiated by the directors, as having been issued by the secretary, without authority, in an action to recover back from the broker, the price paid him by the plaintiff, for the scrip and his commissions, on the ground of it not being genuine, it was held that the proper question for the jury was, whether what the plaintiff intended to buy, was not that which went in the market as "Kentish Coast Railway Scrip," there being no other form of that scrip in the market at the time. Lamert *v.* Heath, 15 M. & W. 486; 4 Railw. C. 302; *ante*, § 36.

The remarks of Lord *Campbell*, Ch. J., in the very late case of Humfrey *v.* Dale, 20 Law Rep. 227, in regard to the necessity of relaxing the rule of the

ought to have been, and any local custom, or usage of trade, which was in fact known to both parties, is regarded as if incorporated into the contract, the parties being presumed to have contracted with reference to it.[3] *But it may be questionable, perhaps, whether the custom in regard to sales of stock, in this

admissibility of oral evidence to explain the import of commercial terms and memoranda in written contracts between merchants and business men, are certainly worthy of his lordship's eminent reputation for wisdom and learning :—

"The only remaining question is, having stated a purchase for a third person as principal, is there evidence on which they themselves can be made liable? Now neither collateral evidence, nor the evidence of a usage of trade, is receivable to prove any thing which contradicts the terms of a written contract; but subject to this condition both may be received for certain purposes. Here the plaintiff did not seek, by the evidence of usage, to contradict what the tenor of the note primarily imports, namely, that this was a contract which the defendants made as brokers. The evidence, indeed, is based on this. But the plaintiff seeks to show that, according to the usage of the trade, and as those concerned in the trade understand the words used, they imported something more; namely, that if the buying broker did not disclose the name of his principal, it might become a contract with him, if the seller pleased. The principle on which evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which an uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent. Brown *v.* Byrne, 3 Ell. & Bl. 703. [After alluding to several cases, especially Trueman *v.* Loder, 11 Ad. & Ell. 589, in which case is found a *dictum* adverse to admissibility of this evidence, the learned judge continued :] We may refer to Hodson *v.* Davies, 2 Camp. 530, not as a legal decision opposed to Trueman *v.* Loder—for Lord *Denman*, in his judgment in the latter case, showed that it could not be supposed to carry with it the weight of Lord *Ellenborough's* decision—but because both cases, we think, disclose how entirely the minds of lawyers are under a different bias from that which, in spite of them, will always influence the practice of traders which creates the usage of trade. Lawyers desire certainty, and would have a written contract express all its terms, and desire that no parol evidence beyond it should be receivable; but merchants and traders, with a multiplicity of contracts preparing on them, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. It is the business of courts reasonably to shape these rules of evidence so as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties, when they are to determine on the controversies which grow out of them. The rule to enter a nonsuit must be discharged." See Taylor *v.* Shay, 29 Law Times, 95.

country, would require the purchaser to be *at the sole expense of preparing the proper conveyance. It is safe, perhaps, to say, that the party tendering a conveyance, or he who demands it, in practice, ordinarily causes the instrument, required to be executed, to be prepared in the one case and executed in the other. But less will often suffice, where the other party refuses to proceed.[4]

*SECTION VII.

DAMAGES. SPECIFIC PERFORMANCE.

1. *Damages, difference between contract price and price at time of delivery.*
2. *Equity will decree specific performance of contract for sale of shares.*

§ 38. 1. The damages which either party is entitled to recover, is the difference between the contract price, and the market price at the time for delivery, or, in some cases, a reasonable time after, which is allowed either party for resale or repurchase.[1]

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[4] Walford, 262, note, where it is said, "It would seem, that if the vendor fails to make out a title, this dispenses with a tender of conveyance." But if stock is to be delivered on demand, it is necessary to show an actual request to deliver, in order to sustain an action for non-delivery. Green *v.* Murray, 6 Jur. 728. Where the contract is to deliver stock in a reasonable time, or no time being specified, which the law regards as in a reasonable time, or on or before a day named, it is presumed each party is entitled to the whole time, in which to perform. Stewart *v.* Cauty, 2 Railw. C. 616. It seems that where the deed of settlement required the consent of the directors to the validity of the transfer of shares, it is incumbent upon the vendor to obtain such consent; and where the transfer was duly made, executed, and delivered, and the money for the price paid, but the directors refused to give their assent, it was held the purchaser might recover back the money paid, and that the return of the transfer was collateral to the contract of purchase, and not a condition precedent to the plaintiff's right to recover. Wilkinson *v.* Lloyd, 7 Q. B. 27.

And where the charter of the company, or the statute, prohibits the transfer of the shares, while calls remain due, it was held that a deed of transfer made, while calls remained unpaid, was altogether null and void, so that the company may refuse to register such a transfer, although the calls have been subsequently paid. It is said it would be necessary to reëxecute the deed, after the payment of the calls, before the company could be compelled to register it. Hodges, 121, 122. But it has been said, that if a deed be delivered as an escrow in such case, to take effect when the calls are paid, it may be good. *Patteson*, J., in Hall *v.* Norfolk Estuary Co. 8 Eng. L. & Eq. R. 351.

[1] Barned *v.* Hamilton, 2 Railw. C. 624; Humble *v.* Mitchell, 2 Railw. C. 70; Shaw *v.* Holland, 15 M. & W. 136. But the purchaser is not entitled to recover any advance in the market price of such shares, after a reasonable time for re-

2. And a court of equity will decree a specific performance of a contract to transfer railway shares, but not for the transfer of stock in the funds, as any one may always obtain that in the market, but railway stock is not always obtainable.[2] So it was held, that a court of equity will decree a specific performance against a railway company of a contract to take land and pay a stipulated price.[3]

SECTION VIII.

SPECIFIC PERFORMANCE.

1. *Specific performance decreed against the vendee.*
2. *This was denied in the early cases.*
3. *Owner of original shares may transfer them.*
4. *Will not decree specific performance where not in the power of the party.*

§ 39. 1. It is considered, under the English statutes, that the purchaser of shares in a railway is bound to execute the assignment on his part, procure himself to be registered, pay all calls *intervening the assignment, and the registration of his name as a shareholder, and indemnify the seller against future calls, and upon a bill filed for that purpose, it was so decreed.[1]

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purchase. Tempest *v.* Kilner, 3 C. B. 243, 249. See also Pott *v.* Flather, 5 Railw. C. 85; Williams *v.* Archer, id. 289. But a broker is not entitled to commissions, unless he complete the sale, but may be entitled to reimbursement of actual expenses. Durkee *v.* Vermont Central Railroad, 19 Law Rep. 572. In a recent case in the Common Pleas, Loder *v.* Kekule, 30 Law Times, 64, it was decided, in regard to the subject of damages for breach of contract, by delivery of an inferior article, that if the article was one that could be immediately sold in the market, the rule was, the difference between the market value of the article delivered, and that contracted for. But where the article cannot be immediately resold, as where the resale is delayed by the defendant, the measure of damages is the difference between the value of the article contracted for, at the time and place of delivery, and the amount made by the resale, within a reasonable time of the delivery of the article.

[2] Duncuft *v.* Albrecht, 12 Simons, 189; Shaw *v.* Fisher, 5 Railw. C. 461.

[3] Inge *v.* Birmingham W. & S. V. Railway Co. 23 Eng. L. & Eq. 601; *post*, § 213.

[1] Wynne *v.* Price, 5 Railw. C. 465; Shaw *v.* Fisher, id. 461. These cases were decided by V. C. *Knight Bruce*, and are obviously somewhat at variance with the principles assumed in Humble *v.* Langston, 7 M. & W. 517. The learned judge here seems to have felt a just indignation that any defence should have been attempted in such a case. "The defence," said he, "was without apology or excuse." And this same learned judge, in the case of Jacques *v.* Chambers, 4 Railw. C. 499, held, that where a testator, at the time of his death,

2. But in some of the earlier cases, very similar in principle, the court of chancery declined to interfere, and the opinion is very distinctly intimated, that the law implied no undertaking on the part of the purchaser of railway shares, to assume the position and burdens of the seller.[2]

3. In the case of Jackson *v.* Cocker, a query is started by the Master of the Rolls, upon the authority of Josephs *v.* Pebrer, 3 B. & C. 639, whether a contract by which the original subscribers of shares in a railway stipulate to be relieved from their undertaking, and to substitute another party in their place, is to be regarded as legal? But the case referred to was decided upon the ground that the concern then in question was illegal in itself, within the English statute,[3] as having transferable shares, and affecting to act as a body corporate, without authority by charter or act of parliament.

4. The court of chancery will not decree specific performance against a railway company who promised to allot shares to the plaintiff, especially where it appears such shares have been given * to others.[4] A court of equity will never, it seems, decree specific performance against a party, where it is not in his power to perform, although such incapacity be the result of his own fault. But will, in such case, leave the other party to his remedy at law, by way of damages, which is all that remains.[5]

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was possessed of fifty original shares, and seventy purchased shares in a railway, calls upon which had not all been made, by his will gave thirty whole shares in such railway to trustees, for the benefit of a married woman for life, without power of anticipation, and thirty shares to B., and twenty-five original and five purchased shares having been allotted by the executors to each of the legatees, the testator's estate was liable to pay the calls upon the shares, and a sum to pay the unpaid calls was ordered to be placed to a separate account, and laid out, and the income meanwhile paid to those entitled to the general residue. This case is decided upon the authority of Blount *v.* Hipkins, 7 Simons, 43, 51, which, it is here said, "as it regards both sets of shares, cannot be substantially distinguished from Jacques *v.* Chambers." See also Duncuft *v.* Albrecht, 12 Simons, 189. But it is well settled, that courts of equity in England will not decree specific performance of a contract to sell public stocks, which may always be had in the market. Nulbrown *v.* Thornton, 10 Vesey, 159.

[2] Jackson *v.* Cocker, 2 Railw. C. 368; S. C. 4 Beavan, 89.

[3] 6 Geo. I. c. 18.

[4] Columbine *v.* Chichester, 2 Phillips, C. C. 27.

[5] Greenaway *v.* Adams, 12 Vesey, 395, 400; Varick *v.* Edwards, 11 Paige, 289. In the case of Miller *v.* The Illinois Central Rail. & Robert & Geo. Schuyler, 24

SECTION IX.

TRUSTEE ENTITLED TO INDEMNITY AGAINST FUTURE CALLS.

1. *Trustee entitled to indemnity, on general principles.*
2. *English courts hesitated, in regard to railway shares.*
3 and 4. *Cases reviewed.*
5. *Mortgagees liable, as stockholders, for the debts of the company.*

§ 40. 1. It seems to be regarded as the general rule of chancery law, that the trustee of property is entitled to indemnity, for expenses *bonâ fide* incurred, in the management and preservation of the trust-fund, or estate, either out of the property, or as a personal duty, from the *cestui que trust*, in most cases.[1]

Barb. R. 312, it was held, that where the company, by their treasurer, gave a receipt to the Schuylers for $7,500, to be repaid with interest on demand, or received in payment of ten dollars on a share of stock, to be issued to them or their assigns, when the directors shall authorize the issue of more stock, this only gave the holder of such receipt an option to take the shares, or the money, and that he could not claim to be a holder of stock, or to have any right thereto, until he had given notice of his election to take stock. And where the holder of this receipt had assigned it as collateral security to the plaintiff, with an agreement, that he should have 300 of the shares, but no notice of any interest of plaintiff had been given the company, and the company made a new issue, beyond what was necessary, and after the 7,500 shares had been issued to Robert Schuyler, and the 300 shares set apart by him for plaintiff, but the 300 shares were not transferred to plaintiff, till after the second new issue, nor had the plaintiff knowledge of it at the time he accepted the 300 shares.

It was held that the plaintiff had no claim against the company to allot him the proportion of the new issue of shares, which the 300 shares were entitled to receive, they having no notice of his equitable ownership of the 300 shares. And that although certain information came to the president, while acting in some other capacity, that some contract had been made, by which the Schuylers were to transfer a portion of the stock to the plaintiff, yet as this was not given, or understood as notice to the company, or to him as president, it could not affect the company. And that the surrender of the receipt with certain indorsements, showing plaintiff's interest, after the resolution to issue the stock, fixing the mode of distribution, could not bind them to allot shares to the plaintiff upon the 300 shares.

[1] Murray *v.* De Rottenham, 6 Johns. Ch. R. 52, 67; Green *v.* Winter, 1 Johns. Ch. R. 27; Watts *v.* Watts, 2 M'Cord, Ch. R. 82; Myers *v.* Myers, 2 M'Cord, Ch. R. 264; McMillan *v.* Scott, 1 Monroe, 151; Morton *v.* Barrett, 22 Maine, R. 257; Draper *v.* Gordon, 4 Sand. Ch. R. 210; Egbert *v.* Brooks, 3 Harring. 110; Methodist Episcopal Church *v.* Jacques, 1 Johns. Ch. R. 450; Story on Bailments, § 306, 306a, 357, 358.

2. We apprehend there is no good reason why this principle should not receive a general application to the case of shares in a railway company, held as security for a debt, by way of mortgage or pledge. And it would seem, that no serious question could ever have arisen, upon the subject, but for the strange inconsistencies into which the English courts and judges have been led, by attempting, for so long a period, to maintain the doctrine, laid down, in Humble *v.* Langston,[2] but which is now effectually overruled, in the tribunal of last resort.[3]

3. But we shall refer briefly to the decisions, upon this point, in regard to railway shares, and stock, in other similar companies. * It was held, by *Wigram*, vice-chancellor,[4] that where there was a contract, for retransfer, claimed by the mortgagor, or found, in express terms, in the contract of pledge, or mortgage, or inferable from circumstances, that this was sufficient ground for implying a contract, by the mortgagor, to indemnify the mortgagee, against liability to the creditors of the company, for debts incurred, while his name remained upon the register of shares, as owner, and a decree was made accordingly.

4. The same learned judge, in the same case, considered, that where the mortgage was made simply, as an absolute transfer, subject to redemption, and nothing had passed, binding the mortgagor to take a retransfer of the shares, the mortgagor was not bound to indemnify the mortgagee against debts incurred after the transfer made, in the mortgage, and before the mortgage debt was paid off. But it is here maintained, that the mortgagee has not, in such case any right, at law, against the mortgagor, as to payments, which he has been compelled to make, while he remained the ostensible owner of the shares, even where a contract for retransfer is shown. But a late English writer upon this subject,[5] seems to incline to the opinion that, in such case, an action

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2 7 M. & W. 517.

3 Walker *v.* Bartlett, 36 Eng. Law & Eq. R. 368.

4 Phene *v.* Gillan, 5 Hare, 1. In this case, it was held, that where the mortgagor is entitled to claim a retransfer of shares, standing on the register of shares, in the name of the mortgagee, the debt being paid off, he is entitled to take proceedings to compel such retransfer on the books of the company, in the name of the mortgagee, giving the proper indemnity for costs. And either the company, or the directors, who have prevented the shares from being transferred, are proper parties to the bill, and, it would seem, necessary parties.

5 Hodges, 122.

of trespass on the case might be maintained, against the purchaser of shares, who fails to cause his name to be registered, as owner, or to indemnify the seller against liabilities after the sale. And the same principle will apply to the mortgagee, after the debt is paid. But all these refinements must now, we think, be regarded as effectually abrogated, by the virtual abandonment, by the English courts, of the rule laid down in Humble *v.* Langston, and the recognition of the contrary doctrine.

5. It has been held, in this country, that, where B. being indebted, transferred shares to his creditor, as security, with the power of sale, and upon condition, that the shares should be returned, or accounted for, whenever the debt should be paid, the debt being paid off, and an informal power of retransfer * given the mortgagee, and subsequently a more formal one, the mortgagees were to be regarded as stockholders, until the actual retransfer of the shares, and as such liable to the creditors of the company, under the charter.[6]

As the case of Humble *v.* Langston is not in terms overruled, although it is in principle, we think, we here insert the substance of the opinion of the court in Walker *v.* Bartlett, as showing the present state of the English law on the subject.[7]

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[6] Adderly *v.* Storm & Bailey, 6 Hill, 624. *Bronson*, J., argues the liability of the mortgagees to the creditors of the company, while their names remained on the books of the company, as absolute shareholders, on the ground, that "they might receive dividends, vote at elections, and enjoy all the rights pertaining to the ownership of the property, and with the privileges they must take the burdens of a stockholder." A query is here started whether a retransfer to the mortgagor of the shares, upon the payment of the debt, might not release the mortgagee. "The assignment, as between the parties to it, would have passed the legal interest in the stock." But are the creditors of the company bound to look beyond the register of shares? Rosevelt *v.* Brown, 1 Kernan, 148; Worrall *v.* Judson, 5 Barb. 210; Stanley *v.* Stanley, 13 Shepley, R. 191. In Adderly *v.* Storm, it is intimated, that a fraudulent transfer of stock by a solvent owner to an insolvent party, for the purpose of avoiding liability to the creditors of the company, might not avail the party even at law.

[7] "The case of Wynne *v.* Price, 3 De G. & S. 310, shows that in equity the plaintiff would be entitled, under the circumstances of the present case, to indemnity; but it was contended for the defendant, that however the case might be in equity, there was no contract for indemnity to be implied by law; and the case of Humble *v.* Langston, 7 M. & W. 517, was relied upon as a direct authority against the plaintiff upon this point; and the Court of Common Pleas, in the judgment appealed against, considered that it was bound by that decision, though it was intimated that but for that express decision their own judgment might

*SECTION X.

FRAUDULENT PRACTICES TO RAISE THE PRICE OF SHARES.

1. *Courts of equity will vacate sales so procured.*
2. *Necessary parties.*
3 and 4. *Dividends declared when none are earned will vacate sales, and subject directors to indictment.*
5. *Equity will not interfere where vendor acted* bonâ fide, *unless the shares were valueless.*
6. *Managers of company liable in tort to party injured.*

§ 41. 1. All fraudulent practices, either of the shareholders or directors, resorted to for the purpose of raising the price of shares

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have been different. It must be admitted that, in principle, no substantial difference can be taken between that case and the present, except this—that in Humble *v.* Langston, the plaintiff claimed to be indemnified by the defendant against all future calls, even though made after the defendant had himself transferred the shares to other persons; and the Court of Exchequer at the end of the judgment observes, that if there were any analogy in principle between the case of Burnett *v.* Lynch and that before the court, the defendant's implied promise would only be to indemnify against such calls as should be made while he was beneficially interested, whereas the plaintiff Humble claimed an indemnity against calls made after the defendant had parted with his interest. This, no doubt, is a very important distinction; and though the Court of Exchequer expresses an opinion that there was no contract of indemnity at all, it adverts to the difference between a claim to indemnify during the time the defendant is beneficially interested, and a claim to be indemnified after he has ceased to be interested. The circumstances of the present case are, therefore, distinguishable from those in Humble *v.* Langston, and it consequently is not so direct an authority against the plaintiff's claim in the present case, as at first sight it might appear to be.

*"It seems to us, therefore, that the circumstances of this case bring it directly within the principle upon which Burnett *v.* Lynch was decided. In the present case, the defendant entered into no express agreement to pay calls or indemnify, but he accepted the only transfer the plaintiff could give, and which invested him with full power to become the registered owner of the shares when he pleased. That transfer expressed that the transferree took them subject to the same rules as those under which the plaintiff held them, one of which was, that the registered owner should pay the calls. It could hardly have been the intention of the parties, that if the defendant, for his own benefit, omitted to make a perfect transfer, by registration in the company's books, the plaintiff should still continue to pay the calls; and if that was not the intention, was it not understood between them that the defendant should save the plaintiff harmless from any calls made during the time when he was virtually owner of the shares?

"In Burnett *v.* Lynch, a lease had been granted to Burnett, in which he cove-

in the market, where sales have been induced in faith of the truth of such representations, will be relieved against in a court of equity.[1] As where the directors of a joint-stock company, in order to sell their shares to advantage, represented in their reports, and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends, at a time when the affairs of the company were greatly embarrassed.

2. A person who had been induced, by these means, to purchase shares of one of the directors, filed a bill against that director, praying to be paid his purchase-money and offering to retransfer the shares; a demurrer for want of equity, and because all the other partners in the transaction ought to have been made parties, was overruled. But where a bill was filed against the public officer of a joint-stock bank, charging a similar fraud, through the fraudulent representations of the directors, in their reports, as to the prosperous state of the company's affairs, and that the plaintiff had thereby been induced to purchase five hundred shares in the bank, and praying that the sale

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nanted to pay the rent and repair the premises; his executors assigned the lease to Lynch, subject to the performance of the covenant, but without any express covenant or contract by him that he would pay the rent or perform the covenant. The executors were called upon by the landlord, and obliged to pay damages for not repairing, according to the covenant, during the time Lynch was assignee; the executors brought an action on the case against Lynch founded on a breach of duty in not repairing. In giving judgment for the plaintiffs, *Abbott*, Ch. J., says, 'It is true, the defendant entered into no express covenant or contract that he would pay the rent or perform the covenants; but he accepted the assignment subject to the performance of the covenants; and we are to consider whether any action will lie against him. If we should hold that no action will lie against him, the consequence will follow, that a man having taken an estate from another, subject to the payment of rent and performance of covenants, and having thereby induced an undertaking in the other that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense show that that never could be intended.' He then goes on to say, that though an action on the case would lie, there might also be an action of assumpsit.

"With the distinction of circumstances to which we have already adverted between this case and that of Humble *v.* Langston, we think that the principle upon which the case of Burnett *v.* Lynch was decided, is directly applicable to the present case, and that the plaintiff is entitled to make the rule absolute to set aside the nonsuit, and enter a verdict upon the first count of the declaration, and so much of the pleas as may be applicable to that count."

[1] Stainbank *v.* Fernley, 9 Simons, 556.

might be declared void as between him and the company, and that they might be decreed to repay the purchase-money, it was held, that as the litigation was between one member of the partnership and the other members, the public officer was improperly made a party, as representing the company, and a demurrer was allowed.[2]

*3. The declaring of dividends by the directors, where none have been earned, if done by them for the purpose of fictitiously enhancing the price of shares, for their own benefit, is regarded as such a fraud as will relieve a party who has purchased shares in faith of such facts, at prices greatly beyond their value,[3] and the transfer of the shares will be set aside.

4. In this case,[3] Lords *Campbell* and *Brougham* concurred in saying: "Dividends are supposed to be paid out of profits only, and where directors order a dividend to be paid, when no such profits have been made, without expressly saying so, a gross fraud is practised, and the directors are not only civilly liable to those whom they have deceived and injured, but are guilty of conspiracy, for which they are liable to be prosecuted and punished."

5. Where both parties labored under the same delusion in regard to the value of stock, relief could not be granted, of course, on the ground of fraud in the sale, and a court of equity will not ordinarily interfere to set aside a sale, on the ground of mutual misapprehension as to the state and condition of the subject-matter, unless in extreme cases, as where that is sold as valuable which is wholly valueless, or does not exist.[4] To constitute a fraud in such cases, it is requisite, ordinarily, that the parties should have been upon unequal footing in regard to their means of access to the knowledge of the true state of the company's funds and property, and that the party gaining the advan-

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2 Seddon *v.* Connell, 10 Simons, 58. It was further held, in this case, (10 Simons, 79,) that it is not competent for the party in such case to file a bill against the company and some of the directors, praying, that if he is not entitled to relief against the company, he may have it against the directors, and that such a bill is demurrable, on the ground that the prayer for relief should be absolute, for relief against the directors, in order to maintain the bill against them. But it is not necessary to make all the parties to a fraud defendants in a bill for relief.

3 Burnes *v.* Pennell, 2 House of Lords Cases, 497.

4 1 Story's Eq. Jur. § 142; Hitchcock *v.* Giddings, 4 Price, R. 135, 141; 2 Kent, Comm. 469.

tage in the bargain should, in some way, participate in giving currency to the false estimate of its condition, beyond the mere fact of repeating the report of the directors, where both parties have equal means of judging of its correctness.

6. It seems to be regarded as settled law, that in case of such false representations to raise the price of stocks, and damage thereby sustained, the suffering party may maintain an action of tort against the party making the false representation, although it were not made directly to such injured party, there being no necessity of any privity between the parties to support an action of tort, for a false representation. But, where the action is *ex contractu* or *quasi ex contractu*, some privity is indispensable to the maintenance of the action.[5]

SECTION XI.

LIABILITY OF COMPANY FOR NOT REGISTERING TRANSFERS.

1. *The company liable to action.*
2. *May be compelled to record transfers by mandamus.*
3. *But not compellable to record mortgages of shares.*

§ 42. 1. It seems to be settled in England, that an action will lie against a joint-stock company, who neglect or refuse, upon proper request, to register shares and deliver new certificates, after the deed of transfer has been sent to the secretary. Damages may be recovered it seems, by reason of such refusal of the company, whereby the party is deprived of the right to attend and vote, at the meetings of the company, and especially where calls are made upon the shares, and in consequence of nonpayment, the shares are declared forfeited and sold.[1]

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[5] Gerhard *v.* Bates, 20 Eng. L. & Eq. R. 129. In this case the defendant was one of the promoters and managing directors of a joint-stock company, and, in offering the shares for sale, had guarantied a certain semi-annual dividend to all who should purchase, but without any other communication with the plaintiff personally, but the plaintiff purchased upon the faith of such general guaranty or representation; and it was held that he could not maintain an action upon the guaranty, but that he might recover in tort, as for a fraudulent representation. *Post*, § 175, 187.

[1] Hodges on Railways, 123; Catchpole *v.* Ambergate Railway Co. 1 Ellis & Black. 111; 16 Eng. L. & Eq. R. 163. See also Wilkinson *v.* Anglo California Gold Co. 12 Eng. L. & Eq. R. 444. In regard to the right to sustain a writ of

*2. There can be no question probably, in this country, that where the company refuse, on reasonable request, to make the proper entry upon their books of the transfer of shares, whereby the owner is liable to be deprived of any legal right, or pecuniary advantage, the company may be compelled to do their duty, in the premises, by writ of mandamus.

3. But it has been held, that the company are not bound to register trust-deeds, or mortgages, and especially such as contain other property, or the stock of other companies. The mandamus was refused in such a case, in the Queen's Bench, so late as May, 1856, and upon the ground, as stated, by Lord *Campbell*, Ch. J., that "if the company were bound to register this deed, they must become the custodians of it, and must incur great responsibility, as to its safe custody, and that therefore convenience requires that they should only be bound to register mere transfers, passing the legal title, and showing who is the legal owner of the shares." [2]

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mandamus in England, to compel such transfer, upon the books of the company, see Rex *v.* Worcester Canal Co. 1 M. & R. 529; Regina *v.* Liverpool, Manchester, & Newcastle-upon-Tyne Railway Co. 11 Eng. L. & Eq. R. 408; Sargent *v.* Franklin Insurance Co. 8 Pick. 90. So also an action on the case will lie for not transferring stock. The rule of damages, where the stock has been sold, as the property of the vendor, is the value of the shares, at the time of the refusal, 8 Pick. 90, or it has sometimes been held, the highest value, between the time of refusal and the commencement of the action. Kartright *v.* Buffalo Commercial Bank, 20 Wend. 91; s. c. 22 Wend. 348. And some cases extend it even to the time of trial. But see *ante*, § 36, 38.

Where stock in a railway is purchased and registered in the name of a married woman, out of her earnings, she and her husband may sue jointly for dividends, and if she sue alone, it is only ground of abatement. Dalton *v.* Midland Railway Co. 20 Eng. L. & Eq. R. 273.

Stock cannot be transferred so as to pass the title after the dissolution of the corporation, the shareholders being then only entitled to a share in the assets. James *v.* Woodruff, 2 Denio, 574.

Where a company have registered a transfer, which is alleged to be a forgery, and are threatened with a suit from both the transferrer and the transferree, the court will not grant an interpleader. Dalton *v.* Midland Railway Co. 22 Eng. L. & Eq. R. 452.

2 Regina *v.* General Cemetery Co. 36 Eng. L. & Eq. R. 126.

SECTION XII.

WHEN CALLS BECOME PERFECTED.

1. *Calls are made when the sum is assessed, notice may be given afterwards.* | 2. *Directors the proper authority to make calls.*

§ 43. 1. The English statute of 1845, called the Companies Clauses Consolidation Act, requires all calls to be paid before any valid transfer can be made. Under this statute and similar provisions in special charters, it has often been made a question, when a call may be said to be made. It seems to be considered, that the word call, in this connection, may refer to the resolution of the directors, by which a certain sum is required to be paid to the company, by the shareholders,[1] or secondly to the notice to the shareholders of the assessment, and the time and place at which they will be required to make payment, and the amount to be paid. But it seems finally to be settled, that the company are not obliged to regard any transfer, made after the resolution of the directors, making the assessment, which need not specify the time of payment, but that may be determined, by a subsequent act of the board.[2]

2. It seems the directors, and not the company, are the proper parties to make calls, under the English statutes.

3. This seems to have been decided upon the general ground of the authority of the directors.[3]

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[1] *Ex parte* Tooke, *In re* The Londonderry and Coleraine Railway Co. 6 Railw. C. 1 (1849); North American Colonial Association of Ireland *v.* Bentley, 19 L. J. (Q. B.) 427; 15 Jur. 187.

[2] Great North of England Railway Co. *v.* Biddulph, 2 Railw. C. 401; 7 M. & W. 243; Newry and Enniskillen Railway Co. *v.* Edmonds, 5 Railw. C. 275; s. c. 2 Exch. 118, 122. *Parke*, B., in The Ambergate, &c. and Eastern Junction Railway Co. *v.* Mitchell, 6 Railw. C. 235; s. c. 4 Exch. 540; Regina *v.* Londonderry & Coleraine Railway Co. 13 Q. B. 998.

[3] Ambergate, N. & B. & Eastern Junction Railway Co. *v.* Mitchell, 4 Exch. 540. *Pollock*, Ch. B. "The next objection is, that the directors made these calls; but they were competent to do so, as they may do all things, except such as are to be done by the shareholders at a general meeting; and there is nothing in the act, which makes it necessary that the company should make calls at a general meeting."

Parke, B. "The directors may exercise all the powers of the company except those which are to be exercised by the company at their general meeting, and the power of making calls is not such a power as is required to be so exercised."

SECTION XIII.

TRANSFER BY DEATH, INSOLVENCY, OR MARRIAGE.

1. *Mandamus lies to compel the registry of successor.*
3. *In case of death, personal representative liable to calls.*
4. *Notice requisite to perfect the title of mortgagee.*
5. *Stock in trust goes to new trustees.*
6. *Assignees of insolvents not liable for the debts of the company.*

§ 44. 1. The title to shares in a railway is liable to transfer by the death, bankruptcy, or insolvency of the proprietor, or by marriage of the female owner of such shares. In such case the English statute requires a declaration of the change of ownership, to be filed with the secretary of the company, and the name of the new owner is thereupon required to be entered upon the register of shareholders. A mandamus will lie to compel the clerk to make the proper entry in such case.[1]

2. These incidents are so much controlled by local laws, in different jurisdictions, that it would scarcely comport with our object to state more than the general principles affecting them. In most of the United States all property, (especially personal estate, as railway shares,) in the first instance, upon the decease of the proprietor, vests in his personal representative, in trust, first for the payment of debts, and afterwards for legatees, or in default of them, the heirs of such proprietor.

3. And so far as regards voting upon such shares, the title of the executor or administrator will ordinarily be sufficient. Before the name of the executor or administrator is entered upon the books of the company, as a shareholder, the estate only could be held liable for calls probably, and perhaps the same rule of liability would obtain after that.[2]

4. In case of death or insolvency, the title of a mortgagee first

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[1] Rex *v.* Worcester Canal Company, 1 M. & R. 529.

[2] Fyler *v.* Fyler, 2 Railw. C. 873, 3 Beav. 550; Jacques *v.* Chambers, 4 Railw. C. 499. But the administrator or other personal representative of a deceased shareholder, may, under the recent English statute, the Common-law Procedure maintain an action against the company for refusal to register his name, as successor, to the title to the shares, and after having recovered damage, he is entitled to a mandamus to compel the company to register his name. He is also entitled to the prerogative writ of mandamus in such cases at common law. Norris *v.* The Irish Land Co. 30 Law Times, 132.

notified to the company, will commonly have priority.[3] Notice to the company is necessary to perfect the title of a mortgagee, in case of bankruptcy or insolvency.[4]

5. As to the title of the bankrupt, all shares standing upon the register of the company in his name, will be regarded as under his control, order, and disposition, and will, under the English statutes, go to the assignees.[5] But stock in any incorporated company standing in the name of the bankrupt, as trustee, is to be transferred by the assignee to the name of new trustees, and a court of chancery will so order.[6]

6. The assignees of an insolvent estate, a portion of whose assets consist of shares in a manufacturing corporation, are not * liable under special statutes, making shareholders liable for the debts of the corporation. That is a provision of positive law, and is to be construed strictly.[7]

SECTION XIV.

LEGATEES OF SHARES.

1. *Entitled to election, interest, and new shares.*
2. *Shares owned at date of will pass, although converted into consolidated stock.*
3. *Consolidated stock subsequently acquired will not pass.*

§ 45. 1. Legatees of railway shares have the election out of which class of shares their legacy shall be paid, when there is more than one class of the same description found in the will. And they are entitled to the income of the shares, after the death of the testator, and to receive any advantage, by way of new shares resulting from the ownership of the shares.[1]

2. A bequest of the testator's railway shares, of which he should be possessed at his decease, was held to pass such railway shares specifically named in the will, as the testator had at the date of his will, although subsequently converted into con-

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[3] Cumming *v.* Prescott, 2 Yo. & Coll. Eq. Exch. 488.

[4] But where all parties are partners, notice will sometimes be implied. *Ex parte* Waitman, 2 Mont. & Ayr. 364; Duncan *v.* Chamberlayne, 11 Simons, 123; Ettey *v.* Bridges, 2 Yo. & Coll. 486.

[5] Shelford, 118–121.

[6] *Ex parte* Walker, 19 Law J. Bank. 3.

[7] Gray *v.* Coffin, 9 Cush. R. 192.

[1] Jacques *v.* Chambers, 4 Railw. C. 205; Tanner *v.* Tanner, 5 Railw. C. 184.

solidated stock of the same company, by a resolution of the company.

3. But that other consolidated stock of the same company, owned by testator at his decease, did not pass under the will, the same having been purchased after the execution of his will.[2]

SECTION XV.

SHARES IN TRUST.

1 and 2. *Company may safely deal with registered owner.*

3. *But equity will protect the rights of* cestuis que trust.

§ 46. 1. By the English statute, railway companies are not bound to see to the execution of trusts in the disbursement of * their dividends, but are at liberty to treat the person in whose name the shares are registered as the absolute owner. It would seem that in case of the bankruptcy of a shareholder in a joint-stock company, a court of equity will sometimes protect trust funds, although registered in the name of the bankrupt, both from the claim of the assignee and the company, who have made advances to the nominal owner, upon the faith of his being the true owner, but without any pledge of the stock.[1]

2. In general, in this country, it is believed railway companies will be protected in dealing *bonâ fide* with the person in whose name shares are registered on the books of the company, as the absolute owner, notwithstanding any knowledge they may have of the equitable interest of third parties.

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2 Oakes *v.* Oakes, 9 Hare, 666.

1 Pinkett *v.* Wright, 2 Hare, 120. This is a very elaborate opinion of the learned Vice-Chancellor *Wigram*, upon the subject of protecting the interest of *cestuis que trust* in the stock of a banking company, standing in the name of a trustee who had become bankrupt. The trustee was also the proprietor of shares in his own right, all standing in his name, without any thing on the books of the company to distinguish which were trust funds.

It was held that the trustee must be presumed to have pledged such stock as belonged to himself, and not that of his *cestuis que trust*, and that shares, which stood in the name of the trustee at the time of the bankruptcy, and thenceforward remained in his name, might fairly be presumed to be identical with those in which the trust funds were invested, the number of shares being the same.

Notice to the company is indispensable to create an equitable mortgage of railway shares. *Ex parte* Boulton *v.* Skelehley, 29 Law Times, 71.

3. But there can be no question, a court of equity will always protect the interest of a *cestui que trust*, when it can be done without the violation of prior or superior equities, which have *bonâ fide* attached.

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*CHAPTER IX.

ASSESSMENTS OR CALLS.

SECTION I.

PARTY LIABLE FOR CALLS.

1. *The party upon the register liable for calls.*
2. *Bankrupts remain liable for calls.*
3. Cestuis que trust *not liable for calls in law or equity.*

§ 47. 1. It seems to be settled law, that the registered owner of railway shares is liable for all calls thereon, so long as his name remains upon the register.[1] The effect of the transfer of railway scrip is only to convey an equitable interest in the shares, with the right to have the shares formally assigned to him, and his name entered upon the register as a shareholder.[1]

2. In case of bankruptcy, the bankrupt remains liable for all calls, unless the names of the assignees are registered on the books of the company, as this is not regarded, as a debt payable in future, and which may be proved under the commission.[2]

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[1] Midland Great Western Railw. Co. *v.* Gordon, 5 Railw. C. 76; s. c. 16 M. & W. 804; Mangles *v.* Grand Collier Dock Co. 2 Railw. C. 359; Sayles *v.* Blane, 6 Railw. C. 79; West Cornwall R. *v.* Mowatt, 15 Q. B. 521. In this case it was said, even if the transaction, by which the title to the stock and the registry of defendant's name were made, were illegal, it could not avail him in an action for calls. See *post*, § 236.

Long Island R. Co. 19 Wend. 37; Mann *v.* Currie, 2 Barb. 294; Hartford & N. H. R. *v.* Boorman, 12 Conn. 530; Mann *v.* Cooke, 20 Conn. R. 178; Rosevelt *v.* Brown, 1 Kernan, 148. The registry-book of shareholders is *primâ facie* evidence of the liability of those, whose names appear upon it, to calls, although irregularly kept. Birmingham R. *v.* Locke, 1 Q. B. 256; London Grand J. R. *v.* Freeman, 2 Man. & Gr. 606; Same *v.* Graham, 1 Q. B. 271; Aylesbury R. *v.* Thompson, 2 Railw. C. 668. This last case holds that the purchaser of shares is only liable for calls *made* after his name is upon the register.

[2] South Staffordshire R. *v.* Burnside, 2 Eng. L. & Eq. R. 418; s. c. 5 Exch. 129; 6 Railw. C. 611.

*3. The trustee of shares, whose name appears upon the books of the company, is alone liable for calls, and the company have no remedy in equity for calls against the *cestui que trust*.[3]

SECTION II.

COLORABLE SUBSCRIPTIONS.

1. *Colorable subscriptions valid.*
2. *Directors may be compelled to register them.*
3. *Oral evidence to vary the written subscription inadmissible.*

§ 48. 1. Equity will not restrain a railway company from enforcing calls, by action at law, upon the ground that one of the conditions of the charter, requiring a certain amount of subscriptions of stock, before the incorporation took effect, had not been complied with, but that a fraud upon the provision had been practised, by means of colorable subscriptions. The Court of Chancery regards colorable subscriptions, made in the course of getting a bill through the House of Lords, (to comply with one of the standing rules of that house, requiring three fourths of the requisite outlay to be subscribed, before the bill passes,) to be binding upon the directors and managers, who make the same, and that they are in fact valid and binding subscriptions, although such subscriptions were made with the purpose of being subsequently cancelled, and had never been registered upon the books of the company, or any calls made upon them.

2. It is in the proper range of the powers of a court of equity, to compel the directors to register such shares and enforce the payment of calls upon them.[1]

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[3] The Newry, W. & R. R. *v.* Moss, 4 Eng. L. & Eq. R. 34; s. c. 14 Beavan, 64. But where in winding up the affairs of a company the name of one of the members, who had obtained his certificate since the expenses were incurred, was placed among the contributories, it was held he was not liable. Chapple's case, 17 Eng. L. & Eq. R. 516; s. c. 5 De Gex & S. 400.

[1] Preston *v.* Grand Collier Dock Co. 2 Railw. C. 335; Mangles *v.* The Same, id. 359. The principle of these cases is very distinctly recognized in the case of Blodgett *v.* Morrill, 20 Vt. R. 509, and it lies at the foundation of all fair dealing, that one is bound by his own representations, upon which he had purposely induced others to act, although, at the time, he did not intend to be himself bound by them, but expected, through favor, to be relieved from their performance. See also Henry *v.* Vermilion R. Co. 17 Ohio, 187. But if one obtain shares in a distribution by commissioners, by fraud, he may be compelled, in equity, to sur-

*3. Oral evidence is inadmissible to vary the terms of a subscription to the stock of a railway unless it tend to show fraud or mistake.[2] But where the subscriber is really misled, and induced to subscribe for stock, upon the representation of a state of facts, in regard to the time of completing the road, or its location made by those who take up the subscription, and in good faith, and upon proper inquiry, and the exercise of reasonable discretion, believed

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render them to other subscribers, to whom they would have been awarded, but for such fraud. Walker *v.* Devereaux, 4 Paige, 229.

A subscription to the stock of a railway made in the common form upon the books of the company, the subscriber at the time of subscription taking the following writing, signed by the clerk of the company, by order of the directors:—

"In consideration that Ebenezer E. will subscribe for thirty shares in the White Mountains Railway, said company agree to release him from twenty-five of said shares, or such portion of said twenty-five shares, as he may within one year elect to withdraw from his subscription, and if he has been assessed, and has paid any thing on said shares, that he elects to be released from, that these payments shall be allowed him, on the shares that he retains, and that the treasurer shall regulate his stock accounts and assessments accordingly," is a valid subscription for the thirty shares, it having been understood, at the time of making the subscription, between the subscriber and the directors, that the same was to be held out to the public, as a *bonâ fide* subscription for the thirty shares, and no disclosure made of the writing, given to the subscriber.

It was held, that the agreement to release the subscriber, was a fraud upon other subscribers, and void, and the subscription may be enforced. White Mountains Railw. *v.* Eastman, 34 New H. R. 124.

See also Conn. & Pass. River R. *v.* Bailey, 24 Vt. R. 465; Mann *v.* Pentz, 2 Sand. Ch. 257; Penobscot & Kennebec R. *v.* Dunn, 39 Maine, R. 601.

[2] Wight *v.* Shelby Railw. 16 B. Monroe, 5, Blodgett *v.* Morrill, 20 Vt. R. 509; Kennebec & Portland R. *v.* Waters, 34 Maine R. 369. But mere mistake, or misapprehension of the facts, by the subscriber, is no ground of relief, unless it amount to fraud and imposition, brought about by some agent of the company. Hence where one subscribed for shares in a railway, under the mistaken belief that he might forfeit his stock at will, and be no further liable, he was held liable, notwithstanding this belief was the result of assurances made, by the person taking the subscription, at the time of its being made, that such were the terms of subscription secured by the charter, such assurances being founded in mistake, and not wilfully false. Railroad Company *v.* Roderigues, 10 Rich. (S. C.) R. 278; N. C. Railw. *v.* Leach, 4 Jones Law R. 340. It is here said, that one of the commissioners, in taking subscriptions to the stock of a railway company, has no right to give any *assurances* as to the line of location which will be adopted. And if the location is different from that provided in the charter of the company, the party may lose the right to object to paying his subscriptions, on that ground, unless he resort to mandamus or injunction, at the earliest convenient time. Booker, *ex parte*, 18 Ark. 338.

by the subscriber, and which constitutes the prevailing motive and consideration for the subscription, and which proves false, it would seem that the contract of subscription should be held void, both in law and equity.[3]

SECTION III.

MODE OF ENFORCING PAYMENT.

1. *Subscription to indefinite stock, raises no implied promise to pay the amount assessed.*
2. *If shares are definite, subscription implies a promise to pay assessments. Right of forfeiture a cumulative remedy.*
3. *Whether issuing new stock will bar a suit against subscriber, quære.*
4. *It would seem not.*
5. *But the requirements of the charter and general laws of the State, must be strictly pursued in declaring forfeiture of stock.*

§ 49. 1. The company may resort to all the modes of enforcing payment of calls which are given them by their charter, or the general laws of the state, unless these remedies are given in the alternative. But the principal conflict in the cases seems to arise upon the point of maintaining a distinct action at law for the amount assessed. Many of the early turnpike and manufacturing companies, in this country, did not create any definite, or distinct *capital stock, to consist of shares of a definite amount, in currency, but only constituted the subscribers a body corporate, leaving them to raise their capital stock, in any mode which their by-laws should prescribe. And in some such cases, the charter, or general laws of the state, gave the company power to assess the subscribers according to the number of shares, held by each. But the amount of the shares was not limited. The assessments might be extended indefinitely, according to the necessities of the company. In such cases, where the only remedy given, by the deed of subscription, the charter and by-laws, or the general laws of the state, was a forfeiture of the shares, the courts generally held, that the subscriber was not liable to an action *in personam* for the amount of calls.[1] And this seems to us alto-

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[3] Henderson *v.* Railway Company, 17 Texas R. 560.

[1] Franklin Glass Co. *v.* White, 14 Mass. R. 286; Andover Turnpike Co. *v.* Gould, 6 Mass. R. 40; Same *v.* Hay, 7 id. 102; New Bedford Turnpike Co. *v.* Adams, 8 id. 138; 3 Fairfield, 388; 2 New Hamp. R. 380. But where there was an express promise to pay assessments, or facts from which such an undertaking was inferable, it was always held, even in this class of cases, that an action

gether reasonable and just. For if a subscription to an indefinite stock created a personal obligation to pay all assessments made by the company upon such stock, it would be equivalent to a personal liability of the stockholders for the debts and liabilities of the company; as we shall see, hereafter, that the directors of a corporation may be compelled, by writ of mandamus, to make calls upon the stock, for the purpose of paying the debts of the company.[2]

2. But where the stock of the company is defined in their charter, and is divided into shares of a definite amount in money, a subscription for shares is justly regarded as equivalent to a promise to pay calls, as they shall be legally made, to the amount of the shares. This may now be regarded as settled, both in this country and in England, and that the power, given the company to forfeit and sell the shares, in cases where the shareholders fail to * pay calls, is not an exclusive, but a cumulative remedy, unless the charter, or general laws of the state, provide that no other remedy shall be resorted to by the company.[3]

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will lie. Taunton & South Boston Turnpike Co. *v.* Whiting, 10 Mass. R. 327; Bangor Bridge Co. *v.* McMahon, 1 Fairfield, 478. But a subscriber to the stock of a turnpike company, who promised to pay assessments, when afterwards the course of the road was altered by law, was held thereby exonerated. Middlesex Turnpike Co. *v.* Swann, 10 Mass. R. 384. The citation of cases to these points, might be increased indefinitely, but it is deemed useless, as these propositions have never been questioned. 5 Mass. 80.

The following cases will be found to confirm the cases cited above. Chester Glass Co. *v.* Dewey, 16 Mass. R. 94; Newburyport Bridge Co. *v.* Story, 6 Pick. 45; Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23; Ripley *v.* Sampson, 10 id. 371; Cutler *v.* Middlesex Factory Co. 14 id. 483.

[2] *Post*, § 50.

[3] Hartford & New Haven Railway Co. *v.* Kennedy, 12 Conn. 499. In this case it was held, that from the relation of stockholder and company thus created, a promise was implied to pay instalments, that the clause authorizing a sale of the stock was merely cumulative; and that whether the company resorted to it, or not, the personal remedy against the stockholder remained the same. The same points are confirmed by the same court, in Mann *v.* Cooke, 20 Conn. 178. And in Danbury Railw. Co. *v.* Wilson, 22 Conn. 435, the defendant was held liable for calls upon a subscription to the stock of a company whose charter had expired, and been revived, by the active agency of defendant.

All the cases, with slight exceptions, hold, that where the subscription is of such a character as to give a personal remedy against the subscriber, in the absence of all other specific redress, the mere fact that the company have the power to forfeit the shares for non-payment of calls, will not defeat the right to enforce the pay-

*3. The question in the English cases seems to be, whether after the forfeiture of the shares, and a confirmation of the same by the company, and the issuing of new stock in lieu of the for-

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ment of calls by action. Goshen Turnpike Co. *v.* Hurtin, 9 Johns. 217; Dutchess Cotton Manufacturing Co. *v.* Davis, 14 Johns. 238; Troy T. Co. *v.* McChesney, 21 Wend. 296; Northern R. *v.* Miller, 10 Barb. 260; Plank Road Co. *v.* Payne, 17 Barb. 567. In this last case it was held to be matter of intention and construction, whether the remedies were concurrent and cumulative, or in the alternative. And in Troy and Boston R. *v.* Tibbitts, 18 Barb. 297, it is said to be well settled, that the obligation of actual payment is created, by a subscription to a capital stock, unless plainly excluded by the terms of the subscription, and that the forfeiture is a cumulative remedy. Ogdensburg R. & C. Railway *v.* Frost, 21 Barb. 541. See also Herkimer M. & H. Co. *v.* Small, 21 Wend. 273; 2 Hill, 127; Sagory *v.* Dubois, 3 Sand. Ch. R. 466; Mann *v.* Currie, 2 Barb. 294; Mann *v.* Pentz, 2 Sand. Ch. R. 273; Ward *v.* Griswoldville Manuf. Co. 16 Conn. 593; Lexington & West Cambridge R. *v.* Chandler, 13 Met. 311; Klein *v.* Alton & Sangamon R. 13 Illinois, 514; Ryder *v.* Same, id. 516; Gayle *v.* Cahawba R. 8 Ala. R. 586; Beene *v.* Cahawba & M. R. 3 id. 660; Spear *v.* Crawford, 14 Wend. 20; Palmer *v.* Lawrence, 3 Sand. Sup. Ct. R. 161, where Duer, J., says the law must now be considered as settled, "that the obligation of actual payment is created in all cases, by a subscription to a capital stock, unless the terms of a subscription are such as plainly to exclude it." Elysville *v.* O'Kisco, 5 Miller, 152; Greenville & Columbia R. *v.* Smith, 6 Rich. 91; 3 Strob. 245; Banet *v.* Alton & Sangamon R. 13 Illinois R. 504, 514; Hightower *v.* Thornton, 8 Georgia R. 486; Freeman *v.* Winchester, 10 Sm. & M. 577; Tar River Nav. Co. *v.* Neal, 3 Hawks, 520; Gratz *v.* Redd, 5 B. Mon. 103; Selina R. *v.* Tipston, 5 Ala. 787; Troy & B. R. *v.* Kerr, 17 Barb. 581. Where the statute gives an election to the company either to forfeit the shares for non-payment of calls, or to sue and collect the amount of the shareholder, it was held that no notice of such election was necessary to be given before suit brought. New Albany & Salem R. *v.* Pickens, 5 Ind. 248. The terms of the charter must be pursued where they provide specifically for the redress for non-payment of calls. As if the shareholder is made liable only for deficiency after forfeiture and sale of the stock. Gray *v.* Turnpike Co. 5 Rand. 578; Essex Bridge Co. *v.* Tuttle, 2 Verm. R. 393. But some of the American cases seem to hold, that a corporation has no power to enforce the payment of calls, against a subscriber for stock, unless upon an express promise, or some express statutory power, and that a subscription for the stock is not equivalent to an express promise to pay calls thereon to the amount of the shares. Kennebec & Portland R. *v.* Kendall, 31 Maine, 470. But this class of cases is not numerous, and is, we think, unsound. See also Allen *v.* Montgomery R. 11 Ala. 437. It has been held, that after the forfeiture is declared, the company cannot longer hold the subscriber liable. Small *v.* Herkimer M. & H. Co. 2 Comst. 330. So if the company omit to exercise their power of forfeiture, as the successive defaults occur, until all the calls are made, it thereby loses its remedy by sale. Stokes *v.* The Lebanon & Sparta Turnpike Co. 6 Humph. 241. See also Harlaem Canal Co. *v.* Siexas, 2 Hall, 504; Delaware Canal Co. *v.* Sansom, 1 Binney, 70.

feited shares, the subscriber is still liable for any deficiency. The cases all regard him, as liable, under the English statutes, to a personal action, until the confirmation of the forfeiture of his stock.[4]

*4. But in a late case, in the House of Lords,[5] it seems to have

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The fact that the commissioners have by the charter an option to reject subscriptions for stock, does not make them less binding, unless they are so rejected. Connecticut & Passumpsic R. R. *v.* Bailey, 24 Verm. R. 465. An agreement made at the time of subscription inconsistent with its terms, and resting in oral evidence merely, cannot be received to defeat the subscription. 24 Verm. R. 465, S. C. In a late case in Kentucky this subject is very elaborately discussed by the counsel, and, as it seems to us, very wisely and very justly disposed of by the court. McMillan *v.* Maysville & Lexington Railway Co. 15 B. Monroe, 218. It was there held, that subscriptions to the stock of a railway company, like other contracts, should receive such construction, as will carry into effect the probable intention of the parties. That the stock subscribed was to be the means, by which the road should be constructed, and hence, that a subscription for stock, on condition that the road should be so "located and constructed as to make the town of Carlisle a point," imposed upon the subscribers the duty to pay, upon the location of the road in that place, and that the construction of the road was not a condition precedent to the right to recover for calls on the stock. See also New Hampshire Central R. *v.* Johnson, 10 Foster, R. 390; South Bay Meadow Dam Co. *v.* Gray, 30 Maine R. 547; Greenville & Columbia R. *v.* Cathcart, 4 Rich. 89; Danbury & Norwalk R. *v.* Wilson, 22 Conn. R. 435. An agreement to take and fill shares in a railway company, is an agreement to pay the assessments legally made. Bangor Bridge Co. *v.* McMahon, 10 Maine R. 478; Buckfield Br. R. *v.* Irish, 39 id. 44; P. & K. R. *v.* Dunn, id. 587; Penobscot R. *v.* Dummer, 40 Maine R. 172; White Mountains Railw. *v.* Eastman, 34 N. H. R. 124.

[4] Great Northern R. *v.* Kennedy, 4 Exch. R. 417. So the allottees of shares in a projected railway company are made liable for a proportionate share of the expense. Upfill's case, 1 Eng. R. 13; 7 id. 28; London & B. R. *v.* Fairclough, 2 Man. & Gr. 674; Edinburgh L. & N. H. R. *v.* Hibblewhite, 2 Railw. C. 237; Birmingham, Burton & Th. J. R. *v.* Locke, 2 Railw. C. 867; Railway Co. *v.* Graham, 1 Ad. & Ellis (N. S.) 271; Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36. It has been held, that a shareholder cannot absolve himself from calls, by paying the directors a sum of money for his discharge, even though the money be accepted, and the shares transferred. Bennett, *ex parte*, 27 Eng. L. & Eq. R. 572. See also § 4, *post*, Appendix A.

[5] Inglis *v.* Great Northern R. 16 Eng. L. & Eq. R. 55. See also Peoria & Oquaka R. *v.* Etting, 17 Ill. R. 429; Cross *v.* Mill Co. 17 Ill. R. 54.

But where the deed of settlement gave the right to forfeit the shares, at once, or to enforce the payment, if they should think fit, it was held, that a judgment for the amount due is a bar to any subsequent forfeiture. Giles *v.* Hutt, 3 Exch. R. 18. And where the charter of the company provided, that the shares of a delinquent shareholder, "shall be liable to forfeiture, and the company may

been settled, upon great consideration, that where the charter or general statutes, give the right to forfeit the shares, or to collect the amount of the shareholder, and the forfeiture, sale, and cancellation of the shares, does not produce the requisite amount, the company may issue new shares for the deficiency, and at the same time maintain an action for it, against the former owner.

5. It seems to be well settled, that to entitle the company to sue for calls, the provisions of their charter, and of the general laws of the state, must be strictly pursued. And if the shares have been forfeited and sold without pursuing all the requirements, in such case provided, no action will lie to recover the balance of the subscription.[6] And if the shares be sold for the non-payment of several assessments, one of which is illegal, the corporation cannot recover the remainder of the subscription.[7] But where the by-laws of the company prescribe a specific mode of notice to the delinquent, of the time and place of sale, through the mail, this is not to be regarded as exclusive, but other notice, which reaches the party, in time will be sufficient.[8]

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declare the same forfeited and vested in the company," it was held the option, in declaring such forfeiture, was in the company, and not in the shareholders. Railway Company *v.* Roderigues, 10 Rich. (S. C.) R. 278.

[6] Portland, Saco, & Portsmouth Railw. *v.* Graham, 11 Met. 1.

[7] Stoneham Branch R. Co. *v.* Gould, 2 Gray, 277.

[8] Lexington & West Cambridge Railw. *v.* Chandler, 13 Met. 311. And where the charter required notice of the instalment three weeks prior to the same becoming due, it was held *primâ facie* evidence of compliance by producing the publication, and oral evidence of its being repeated the requisite number of times, without producing all the papers. Unthank *v.* Henry County Turnp. Co. 6 Porter, (Ind.) R. 125.

*SECTION IV.

CREDITORS MAY COMPEL PAYMENT OF SUBSCRIPTIONS.

1. *Company compelled to collect of subscribers by mandamus.*
2, 3, and 4. *Amount due from subscribers, a trust-fund for the benefit of creditors.*
5. *If a state own the stock it will be the same.*
6 and 7. *A diversion of the funds from creditors is a violation of contract on the part of the company, and a state law authorizing it invalid.*
8 and 9. *The general doctrine above stated found in many American cases.*
10. *Judgment creditors may bring bill in equity.*
11. *Promoters of railways liable, as partners, for expenses of procuring charter.*

§ 50. 1. By the present English statute, the creditors of a company may recover their judgment debts, against shareholders, who have not paid the full amount of their shares to the extent of the deficiency.[1] Before this statute, it was considered, that a writ of mandamus would lie, to compel the company to make and enforce calls, against delinquents.[2]

2. In this country this question has arisen, not unfrequently, in the case of insolvent companies, no such provision existing, in most of the states, as that of the English statute, just referred to.

3. This subject is very extensively examined, and considered, by the national tribunal of last resort, in a case of much importance and delicacy,[3] and the following results arrived at :—

4. On the dissolution of a corporation, its effects are a trust-fund, for the payment of its creditors, who may follow them, into the hands of any one, not a *bonâ fide* creditor, or purchaser without notice; and a state law, which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of their contracts, and is invalid.

5. The fact, that a state is the sole owner of the stock, in a banking corporation, does not affect the rights of the creditors.

6. The capital stock of a company, is a fund, set apart, by its

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1 8 & 9 Vict. c. 16, § 36, 37.

2 Walford, 277; Hodges, 106, n. (*u*); Reg. *v.* Victoria Park. Co. 1 Q. B. R. 288, where the opinion of the court very clearly intimates, that the writ of mandamus will lie, to compel the company to enforce the payment of calls, where it appears, that judgments against the company remain unsatisfied, for want of assets. But, under the circumstances of this case, it was not deemed requisite to issue the writ.

3 Curran *v.* State of Arkansas, 15 How. R. 304.

charter, for the payment of its debts, which amounts to a contract * with those who shall become its creditors, that the fund shall not be withdrawn, and appropriated to the use of the owner, or owners, of the capital stock.

7. A law, which deprives creditors of a corporation, of all legal remedy against its property, impairs the obligation of its contracts, and is invalid.

8. These propositions, with the exception of the constitutional question, in regard to the impairing of an assumed, or implied contract, with the creditors of the corporation, are all fully sustained, by numerous decisions, of the highest authority, in this country.

9. Thus in a case before Mr. Justice *Story*, in the Circuit Court,[4] it was held, that the capital stock of a corporation is a trust-fund, for the payment of its debts, and being so, it may, upon general principles of equity law, be followed into other hands, so long as it can be traced, unless the holder show a paramount title.[5] And in cases where the capital stock or assets of a corporation have been distributed to the stockholders, without providing for the payment of its debts, a court of equity will allow the creditors to sustain a bill, against the shareholders, to compel contribution to the payment of the debts of the company, to the extent of funds obtained by them, whether directly from the company, or through some substitution of useless securities, for those which were good.[6]

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[4] Wood *v.* Dummer, 3 Mason, 308.

[5] Adair *v.* Shaw, 1 Sch. & L. 243, 261.

[6] Nathan *v.* Whitlock, 9 Paige, 152; s. c. 3d Edwards's Ch. R. 215. But it has been held, that the distribution of the capital stock among the shareholders, before the debts of the company are paid, and leaving no funds for that purpose, will not render the shareholders liable to an action of tort, at the suit of the creditors of the company, there being no such privity, as will lay the foundation of an action, at law, even in states where no court of chancery existed. Vose *v.* Grant, 15 Mass. 505. In equity the suit may be in the name of the receiver, 9 Paige, 152, or in the name of a creditor, suing on behalf of himself and others, standing in the same relation. Mann *v.* Pentz, 3 Comst. 415, 422. And all the shareholders, who have not paid their subscriptions, should be made parties to the bill, and compelled to contribute proportionally. Ib.

The same principle is recognized in numerous other cases. Mumma *v.* The Potomac Co. 8 Pet. R. 281; Wright *v.* Petrie, 1 Sm. & M. Ch. R. 319; Nevitt *v.* Bank of Port Gibson, 6 Sm. & M. 513; Hightower *v.* Thornton, 8 Georgia R. 486; Fort Edward, &c. Plank Road Co. *v.* Payne, 17 Barb. 567; Gillett *v.* Moody,

*10. Where a corporation have abandoned all proceedings under their charter, from insolvency, and still owe debts, the subscriptions to the capital stock not being all paid, a judgment creditor may proceed, in equity, against the delinquent share-owners, there being no longer any mode, by which calls upon the stock may be enforced, under the provisions of the charter, or by action at law, in favor of the company.[7]

11. It is held under the English statutes, in regard to fully registered companies, which never go into full operation, but have to be closed under the winding-up acts, that a shareholder, who has paid up the full amount of his shares, is still liable to pay the necessary calls, to defray the expenses of winding up the company, the subscribers to such joint-stock companies, under the statute, being held liable to the same extent as partners.[8]

SECTION V.

CONDITIONS PRECEDENT TO MAKING CALLS.

1. *Conditions precedent must be performed before calls.*
2. *But collateral, or subsequent conditions not.*
3. *Definite capital must all be subscribed before calls.*
4. *It is the same where defined by the company, as in the charter.*
5. *Conditional subscriptions not to be reckoned.*
6. *Legislature cannot repeal conditions precedent.*

§ 51. 1. Conditions precedent must be complied with, before any binding calls can be made. Any thing, which, by the express provisions of the charter, or the general laws of the state, is made a condition to be performed on the part of the company,

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3 Comst. 479. This case is where the bank, of which the plaintiff was receiver, had transferred specie funds to defendant, in exchange for his own stock in the bank. The transaction was held illegal, and the defendant was compelled to refund, for the benefit of the creditors of the bank.

See also Morgan *v.* New York & Albany R. 10 Paige, 290.

7 Henry *v.* The Vermilion & Ashland Railw. 17 Ohio R. 187. See also 11 Ohio R. 273; 13 Ohio R. 197. And where the company retains its organization, and officers, it may be compelled by writ of mandamus, to enforce calls against the shareholders, to the extent of their liability, as well as to perform other duties. Commonwealth *v.* Mayor of Lancaster, 5 Watts, 152.

8 Matter of the Sea, Fire, and Life Assurance Society, 23 Eng. L. & Eq. R. 422.

or its agents, before, and as the foundation of, the right to make calls, upon the subscriptions to the stock; or where the thing is required to be done, before calls shall be made, and is an important element in the consideration of the agreement to take stock in the *company, it should ordinarily be regarded as a condition precedent.

2. But where the matter to be done, is rather incidental to the main design, and only affects the enterprise collaterally, it will commonly be regarded as merely directory to the company, or at most as a concurrent or subsequent condition, to be enforced, by independent proceedings, and in the performance of which time is not indispensable.[1]

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[1] Carlisle *v.* Cahawba & Marion Railway Co. 4 Ala. 70; *ante*, § 18; Banet *v.* Alton & Sangamon Railway Co. 13 Ill. 504; Utica & Schenectady Railway Co. *v.* Brinkerhoff, 21 Wend. 139. This last case is an action upon a special undertaking to pay land damages, on condition the company would locate their road so as to terminate at a particular place, which the company alleged they had done, and defendant was held not liable, for want of mutuality, the company not being bound by the contract. Cooke *v.* Oxley, 3 T. R. 653. But it admits of some question, we think, whether the case of 21 Wend. 139, comes fairly within the principle upon which it was decided. The case of Cooke *v.* Oxley, which has been sometimes questioned, is an obvious case of want of consideration on the part of defendant, it being a mere naked refusal of goods, for a fixed time, the plaintiff in the mean time having an election, to take them or not. This class of cases is numerous and sound, resting upon the mere want of consideration. Burnet *v.* M. Biscoe, 4 Johns. R. 235. But where such an option is given upon consideration, or as a standing offer, and in the mean time the other party proceeds to perform the contract on his part, it is as binding in this form as in any other. And it was so held, in the case of the Cumberland Valley Railway Co. *v.* Baab, 9 Watts, 458. In this case the inhabitants of one portion of Harrisburgh made a subscription to induce the company to cross the river at a particular point, and to build their depot upon a particular street, which being done, the subscribers were held liable to pay their subscriptions to the company, and, as we think, upon the most obvious and satisfactory grounds.

In Henderson & Nashville Railway Co. *v.* Leavell, 16 B. Monr. 358, it was held, that a subscription to the stock of a railway, conditioned that the road should pass through a certain town, and the money subscribed should be expended in a certain county, was a valid subscription. The Court, *Stimpson*, J., say: "The stock in this case is not conditional, although the defendant has, in the act of subscribing for it, brought the company under certain obligations to him, in relation to it, with which they are bound to comply. Such stipulations are not incompatible with sound policy, or with any of the provisions of the charter. They do not render the subscriptions void, but operate, as it was intended they should, for the benefit of the stockholder. But even if the subscription had been made,

*3. It is an essential condition to making calls, in those companies, where the number of shares and the amount of capital is fixed, that the whole stock shall be subscribed, before any calls can lawfully be made.[2] And if calls are made before the requisite stock is subscribed, although the subscription is completed before action brought, no recovery can be had.[3] But it has been held that the general provision in the charter of a railway act, that so soon as 1,500,000*l.* shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act, authorizing the construction of the railway, and of the acts therein recited, being the general railway acts, did not require such subscription to be made before making calls, but only before exercising compulsory powers of taking land.[4]

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upon the express condition that the money should not be paid until certain acts were done by the company, when these acts were done, the stock would then be unconditional, and the subscribers would then be compelled to pay it, as was held in McMillan *v.* Maysville & Lexington Railway Co. 15 B. Monr. 218." If a subscription for stock be conditioned, that the subscriber may withdraw his subscription, at his election, if the whole stock is not taken, at a given time, and the defendant pay part of his subscription after that date, he is liable for the balance, unless he show the failure of the condition, and his own election, in a reasonable time after, to withdraw. Wilmington & Raleigh Railway Co. *v.* Robeson, 5 Iredell, 301.

2 Stoneham Branch Railway Co. *v.* Gould, 2 Gray, 277 ; Salem Mill-Dam Co. *v.* Ropes, 6 Pick. 23 ; s. c. 9 Pick. 187 ; Cabot & West Springfield Bridge Co. *v.* Chapin, 6 Cush. 50 ; Worcester & Nashua Railway Co. *v.* Hinds, 8 Cush. 110; Lexington & West Cambridge Railway Co. *v.* Chandler, 13 Met. 312; N. Hampshire Central Railway Co. *v.* Johnson, 10 Foster, R. 390.

But a subscriber for shares in a railway company is liable for calls, although by a subsequent amendment of the charter of the company, the capital stock is limited to four thousand shares, and that number has not been subscribed, there being no such condition, either in the charter of the company, or the terms of subscription, at the time of subscribing. York & Cumberland Railway *v.* Pratt, 40 Maine R. 447. But the number of shares required by the charter must be subscribed, as stated in the text. Penobscot Railway *v.* Dummer, 40 Maine R. 172. But the records of the company are evidence of such fact. Ib. Same *v.* White, 20 Law Rep. 689.

3 Norwich & Lowestoffe Navigation Co. *v.* Theobold, 1 Moody & M. 151 ; Stratford & M. Railway Co. *v.* Stratton, 2 B. & Ad. 518. And see Atlantic Cotton Mills *v.* Abbott, 9 Cush. R. 423, where a condition in a subscription for stock, that the capital stock of the company should not be less than $1,500,000, was held a condition precedent to making calls.

4 Waterford, Wexford, & W. Railway Co. *v.* Dalbiac, 6 Railw. C. 753 ; s. c. 4 Eng. L. & Eq. R. 455. But the American cases will not justify such a construc-

4. And where the charter provides that the members might divide the capital stock into as many shares as they might think proper, and by a written agreement the subscribers fixed the capital stock at $50,000, divided into 500 shares of $100 each, and only one hundred and thirty-eight shares had been subscribed, it was held no assessment for the general purposes of the corporation could be made.[5]

*5. And where the charter of a railway company requires their stock to consist of not less than a given number of shares, assessments cannot be made before the required number is taken. And in such case conditional subscriptions are not to be reckoned, even where the condition is acceded to by the company, if the subscriber still repudiates the subscription, on the ground that the condition is not fully performed, by the contract drawn up in form. And the plea of the general issue, is no such admission of the existence of the company, as to preclude subscribers from contesting the amount of subscriptions, to enable the company to make calls.[6]

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tion. It would here be held a condition precedent to the right to make calls, or even to maintain a corporate existence, probably.

[5] Littleton Manufacturing Co. *v.* Parker, 14 N. Hamp. R. 543; Contocook Valley Railway Co. *v.* Barker, 32 N. Hamp. R. (1 Fogg, R.) 363.

Where the condition of a bond given for the amount of a railway subscription was, that the same should be paid, when the road was "completed" to a certain village, it was held that the condition was performed, when the road was made to the suburbs of the village, in such a manner, as to allow daily trains on it, carrying all the freight and passengers, that offer, although some portion of the work was only temporary. O'Neal *v.* King, 3 Jones, 517; Chapman *v.* Mad River & Lake Erie Railway Co. 6 Ohio St. R. 119.

[6] Oldtown & Lincoln Railway Co. *v.* Veazie, 39 Maine R. 571. Any condition the subscriber sees fit to annex to his subscription must be complied with, before the subscriber is liable to assessments. Penobscot & Kennebec Railway Co. *v.* Dunn, 39 Maine R. 587.

A condition, that not more than five dollars on a share, shall be assessed at one time, is not violated, by two or more assessments being made at one time, if only five dollars is required to be paid at one time. Id. Penobscot Railway *v.* Dummer, 40 Maine R. 172. And where the conditions of a subscription required seventy five per cent. of the estimated cost of any section of the road to be subscribed, by *responsible persons*, before its construction should be commenced, if the subscriptions were obtained in good faith, assessments will be valid, although some of the subscriptions to make up the amount, prove worthless. Id. Same *v.* White, 20 Law Rep. 689.

And where the charter of the company requires that the capital stock be not

6. And where the charter originally required 11,000 shares to be the minimum, and when less than 10,000 were subscribed, the company was organized, and the subscriptions accepted, and assessments made, and afterwards, by an act of the legislature, accepted by the corporation, the minimum was reduced to 8,000 shares, in an action to recover assessments, made on defendant's shares, before and after such alteration of the charter, it was held,

1. That the minimum was a condition precedent, to be fulfilled by the corporation, before the subscribers were liable to assessments.

2. That the alteration of the charter will not affect prior subscribers.

3. Nor will the defendant be estopped from relying upon this condition, by having acted, as a shareholder, and officer, in the corporation, and contributed towards the expenses of the company.

4. That corporators, by any acts, or declarations, cannot relieve the corporation from its obligation, to possess the capital stock, required by its charter.[6]

*SECTION VI.

CALLS MAY BE MADE PAYABLE BY INSTALMENTS.

§ 52. It was at one time considered that calls made payable by instalments were invalid.[1] But it seems now to be settled that such mode of making calls, where the directors of the company have an unlimited discretion, as to the time and mode of requiring payments of the subscriptions, is unobjectionable.[2]

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less than five hundred, nor more than ten thousand shares, of $100 each, and authorizes the directors to assess upon five hundred shares, as soon as subscribed, and from time to time to enlarge the capital to the maximum amount named in the charter, all the shares to be equally assessed, it is not necessary for the company to define their capital, within the prescribed limits, before making calls. White Mountains Railw. *v.* Eastman, 34 N. H. R. 124.

It is doubtful if the directors of a railway have power to release subscribers to stock, but at all events, where the release is optional with the subscriber, he must make his election to be released, and in a reasonable time. Penobscot & Ken. Railw. *v.* Dunn, 39 Maine R. 587.

[1] Ambergate, N. & Boston & E. J. R. *v.* Coulthard, 6 Railw. C. 218; Stratford & M. R. *v.* Stratton, 2 B. & Ad. 518.

[2] London & M. W. R. *v.* M'Michael, 4 Eng. L. & Eq. R. 459; Ambergate R.

But where the subscription contains a provision, that payment shall be made, at such times and places, as should thereafter be directed, by the directors, and shall be applied to the construction of the road, it was held, that the subscription did not become payable, until the directors, at a regular meeting, had fixed the time and place of payment.[3] But it is further held, in this case, that it is not necessary to give notice to the subscribers of the time and place of payment.[3] This point in the decision seems not altogether in accordance with the usual practice in such cases, or the general course of decision in regard to calls, which upon general principles must be notified to subscribers, before an action can be maintained.

SECTION VII.

PARTY LIABLE FOR CALLS.

1. *Subscribers liable to calls.*
2. 6. *What constitutes subscription to a capital stock.*
3. *How a purchaser of stock becomes liable to the company.*
4. *One may so conduct as to estop him from denying his liability.*
5. *The register of the company evidence of membership.*

§ 53. 1. All the original subscribers to the stock in a railway company are usually made liable to calls, by the charter of the company, or by general statute.

2. Some question has arisen in the English courts, as to what *is necessary to constitute one a subscriber. In an early case[1] upon this subject, it was held, that the word "subscriber" in the act of parliament, constituting the company, applied only to those who had stipulated that they would make payment, and not to all those who had advanced money; and that one, who was named in the recital of the act, as one of the original proprietors, and who had paid a deposit on eight shares, but who had not signed any contract, was not a subscriber within the meaning of the act, and not liable to be sued by the directors for calls on the remainder of such shares.

3. This is the generally received opinion upon that subject, in

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v. Norcliffe, 4 Eng. L. & Eq. R. 461; Birkenhead, L. & Ch. R. *v.* Webster, 6 Railw. C. 498.

[3] Ross *v.* Lafayette & Ind. Railway, 6 Porter (Ind.) R. 297.

[1] Thames Tunnel Company *v.* Sheldon, 6 B. & C. 341.

this country. In one case,[2] a plea to an action to recover calls on stock subscribed, that another person had agreed to take the stock, and that the commissioners had counted this stock to such other person, is insufficient. The signature of the first subscriber should have been erased, and that of the other substituted, or something done to hold the latter liable. A subscriber for stock cannot subrogate another person to his obligation, without a substitution of his name upon the books of the company, or some other equivalent act recognized by the charter and by-laws of the company.

4. But the principal difficulty, in regard to liability for calls, arises, where there have been transfers, and the name of the transferree not entered upon the books of the company. For whenever the name of the vendee of shares is transferred to the register of shareholders, the cases all agree, that the vendor is exonerated, (unless there is some express provision of law, by which the liability of the original subscriber still continues,) and the vendee becomes liable for future calls.[3] And the vendee having made such representation to the company, as to induce them to enter his name upon the register of shares, is estopped to deny the validity of the transfer.[4] And even where the party has represented himself to the company as the owner of shares, and sent in scrip certificates, which had been purchased by him, claiming to be registered as a proprietor, in respect thereof, and had received from the company receipts therefor, with a notice that they would be exchanged for sealed certificates on demand, he was held estopped *to deny his liability for calls, although his name had not been entered upon the register of shareholders, or any memorial of transfer entered, as required by the act.[5] And where one had paid calls on shares, or attended meetings of the company, as the proprietor of shares, he is estopped to deny such membership.[6]

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2 Ryder *v.* Alton & Sangamon R. 13 Ill. R. 516.

3 Sheffield & Ashton-under-Lyne & Man. R. *v.* Woodcock, 2 Railw. C. 522; s. c. 7 M. & W. 574; London & Grand J. R. *v.* Freeman, 2 Railw. C. 468; s. c. 2 M. & G. 606; *post*, § 54.

4 Sheffield, Ash. & M. R. *v.* Woodcock, *supra;* London & Grand J. R. *v.* Freeman, *supra.*

5 Cheltenham & Great Western Union R. *v.* Daniel, and Same *v.* Medina, 2 Railw. C. 728. And this being matter of estoppel *in pais*, may be used in evidence, in answer to the defence, without being pleaded.

6 London & Grand J. R. *v.* Graham, 2 Railw. C. 870; s. c. 1 Q. B. R. 271.

5. The holders of scrip certificates are properly entered, as proprietors of shares, before the passing of the act, although they have neither signed the parliamentary contract, nor been original subscribers; and the register-book of shareholders, which is required by the statute to be kept, in a prescribed form, by the company, though irregularly kept, is *primâ facie* evidence who are proprietors.[7]

6. The subscription for stock, to be valid, must be made in conformity with the act. So that where it was required to be made in such form as to bind the subscriber and his heirs, it was deemed requisite to be made under seal.[8] But such a provision is of no force in this country, simple contracts being of the same force as against heirs, as specialties.

7. If by the act of incorporation the shares are made assignable without restriction, and no express provision exists in regard to the party liable for calls, it would seem to follow, upon the general principles of the law of contract, that the proprietor of the share, for the time being, is liable for calls. And where certain formalities are requisite, in the transfer of shares, and these have been complied with on the part of the transferree, or waived by the company, at his request, his liability to calls then attaches.[9] The liability of the original subscriber often continues, at the election of the company, after that against the vendee attaches, but when the company consent to accept the name of the transferree, that of the subscriber, or former proprietor, ceases.[10]

*SECTION VIII.

RELEASE FROM LIABILITY FOR CALLS.

1. 2. *Where the transfer of shares, without registry, will relieve the proprietor from calls.*

3. *Where shares are forfeited, by express condition, subscriber no longer liable for calls.*

§ 54. 1. One may relieve himself of his liability for calls, by

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7 Birmingham, Boston, & Th. J. R. *v.* Locke, 2 Railw. C. 867; s. c. 1 Q. B. 256.

8 Cromford & High Peak R. *v.* Lacy, 3 Y. & Jer. 80. See *ante*, § 18, n. 2.

9 Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36; Aylesbury R. *v.* Mount, 5 Scott, New R. 127; West Philadelphia Canal Co. *v.* Innes, 3 Whart. R. 198; Mann *v.* Currie, 2 Barb. Sup. Ct. R. 294; Hall *v.* U. S. Insurance Co. 5 Gill, 484; Bend *v.* Susquehannah Bridge Co. 6 Har. & J. R. 128; Angell & Ames, ch. 15, § 534.

10 *Post*, § 54.

the transfer of his shares, and the substitution of the name of his assignee, for his own, upon the books of the company. But until this change upon the books of the company is made, they are at liberty to hold the original subscriber liable, if they so elect.[1] But where the act of incorporation of a joint-stock company declared the shares should be vested in subscribers, their executors and assigns, with power to the subscribers to assign their shares, and a committee, to be appointed under the act, were authorized to make calls upon the proprietors of shares, it was held, that an original subscriber, who had transferred his shares, was no longer liable to calls.[2]

2. But this case is determined upon the express provisions of the charter of the company. The general rule, in England, at present, under their consolidated acts, is undoubtedly as stated above. And we see no good reason why it should not equally apply in this country. It would seem to be the only mode of securing the ultimate payment of calls. But some of the cases seem to assume, that the mere transfer of the shares, in the market, does exonerate the subscriber from the payment of future calls. But this depends chiefly upon the provisions of special charters, and the general laws of the state, applicable to the subject.[3]

*3. Where shares are allotted to one upon the express condition, to be forfeited, if a certain deposit is not paid, in a certain time, and nothing more is done, by the allottee, he is not liable for calls, although the company have entered his name upon the register of shares, as a shareholder.[4]

[1] *Ante*, § 47, and cases there cited. In Everhart *v.* West Chester and Philadelphia Railw. 28 Penn. St. R. 339, it is said that a transfer of stock, made for the purpose of exonerating a subscriber, without the consent of the company, is not a valid defence to an action against him for the purchase-money of the shares subscribed.

[2] Huddersfield Canal Company *v.* Buckley, 7 T. R. 36, 42.

[3] In West Philadelphia Canal Co. *v.* Innes, 3 Wharton, 198, it was held, that where the proprietor of shares of the plaintiff's stock, transferred them upon the books of the company, after calls were made, but before they fell due, that the transferree was liable for such calls, although he had never received certificates, or given notice of the acceptance of the transfer. And it was held to make no difference, that the transfer was from an original subscriber, without consideration, and that the holder is nevertheless liable for unpaid calls. Mann *v.* Pentz, 2 Sand. Ch. 258; Hartford & New H. R. *v.* Boorman, 12 Conn. R. 530; Aylesbury R. *v.* Mount, 5 Scott, New R. 127.

[4] Waterford, Wexford, Wicklow, & D. R. *v.* Piddock, 18 Eng. L. & Eq. R.

SECTION IX.

DEFENCES TO ACTIONS FOR CALLS.

1. *Informality in organization of company insufficient.*
2. *Slight acquiescence stops the party in some cases.*
3. 4. *Default in first payment insufficient.*
5. *Company and subscriber may waive that condition.*
6. *Contract for stock, to be paid in other stock.*
7. 8. *Infancy. Statute of limitations and bankruptcy.*

§ 55. 1. It is certainly not competent for a subscriber, when sued for calls, to go, in his defence, into every minute deviation from the express requirements of the charter, in the organization and proceedings of the company. Any member of the association, who intends to hold the company to the observance of those matters, which are merely formal, should be watchful, and interpose an effectual barrier to their further progress, at the earliest opportunity, by mandamus, or injunction out of chancery, or other appropriate mode.[1] In cases of this kind often, where vast expense has been incurred, and important interests are at stake, courts will incline to conclude a member of the association, by the briefest acquiescence, in any such immaterial irregularity, and often, in regard to those, which if urged in season, might have been regarded as of more serious moment. In one case,[1] *Tindal*, Ch. J., says, in regard to the offer of a plea, that the money sued for, being the amount of a call, was *intended for other purposes, than those warranted by the act, "It seems to me it was never intended, nor ought it to be allowed, that so general a question as that should be litigated, in the question, whether a call is due from an individual subscriber." And it was held no sufficient ground of enjoining the directors from

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517. Where the company accept a conveyance of shares to themselves, it will exonerate the owner from calls. But a sale to another company of all the effects of the company, will not release the shareholders from calls already made. Plate Glass Insurance Co. *v.* Sunley, 29 Law Times, 277.

1 The London & Brighton Railw. Co. *v.* Wilson, 6 Bing. N. C. 135. This case decides, that a plea, that the company had made deviations in their line, and that the money sued for was needed only in regard to such deviations, could not be entertained or regarded as a proper inquiry in an action for calls upon shares, and so also of a plea, that fewer shares had been allotted than the act required. Walford, 279; Wight *v.* Shelby Railway, 16 B. Monr. 5.

making calls, that the proceedings had been such as to amount to an abandonment of the enterprise, as it was possible that there were still legal obligations to answer.[2] And where the directors were authorized to limit the number of shares, but could not proceed with the road, until two hundred and fifty shares were subscribed, and after that number were taken, they resolved to close the books, it was held that this vote was equivalent to a vote fixing the number of shares, and that the company might therefore proceed to make and enforce calls, under the statute, and to collect the deficiency remaining, after the sale of forfeited stock.[3]

2. But where the statute prescribes the terms, on which shares may be sold, it must be strictly followed, or the sale will be void, as where the prescribed notice is not given.[4] And it would seem, that the courts are reluctant to admit defences to actions for calls, upon the ground of informality in the proceedings of the company, or even of alleged fraud, where there has been any considerable acquiescence on the part of the shareholder.[5]

3. It seems to have been held, in some cases, that a subscriber for stock may defend against an action for calls, upon the ground that he did not pay the amount required by the charter to be paid down at the time of subscription.[6]

4. But it is questionable how far one can be allowed to plead his own non-performance of a condition in discharge of his undertaking. And a different view seems to have obtained to some extent.[7] It has been held the stockholder cannot object, that he *has not complied with the charter, after having voted at the election of officers, or otherwise acted as a shareholder.[8]

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[2] Logan *v.* Courtown, 5 Eng. L. & Eq. R. 171.

[3] Lexington & West Cambridge R. *v.* Chandler, 13 Met. 311.

[4] Portland, Saco, & Portsmouth R. *v.* Graham, 11 Met. 1.

[5] Walford, 278, 279; Cromford & High P. R. *v.* Lacey, 3 Y. & Jer. 80; Mangles *v.* Grand Collier Dock Co. 2 Railw. C. 359; Thorpe *v.* Hughes, 3 Mylne & Cr. 742.

[6] Highland Turnp. Co. *v.* McKean, 11 Johns. 98; Jenkins *v.* Union Turnp. Co. 1 Caines's Cas. in Error, 86; Hibernia Turnpike Co. *v.* Henderson, 8 S. & R. 219; Charlotte & C. R. *v.* Blakely, 3 Strob. 245.

[7] Henry *v.* The Vermilion R. 17 Ohio, 187. A similar rule is recognized in Louisiana, in the case of Vicks. S. & Texas Railw. July Term, Sup. Court, 1857, 9 Am. Railw. Times, No. 36.

[8] Clarke *v.* Monongahela Nav. Co. 10 Watts, 364. Nor can a subscriber, after having transferred his stock to another, thus treating it as a valid security, object

And so also where the subscription is made, while defendant held the books of the company and acted as commissioner.[9] And payment before the books are closed, has been held sufficient to bind the subscriber.[10] So also if the sum have been collected by suit.[11] And a promissory note has been held good payment, where the charter required cash on the first instalment, at the time of subscription.[12] And, by parity of reason, if the subscription binds the subscriber, to pay for the stock taken, in conformity to the requisitions of the charter, which is the more generally received notion upon the subject, at present, we do not well comprehend why the subscription itself may not be regarded as effectual, to create the subscriber a stockholder, and as much a compliance with the condition to pay, as giving a promissory note. In either case, the company obtain but a right of action for the money, and if the party can be allowed to urge his own default in defence, it is perhaps no compliance with the charter.

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in the trial of a suit against him on the original subscription, that the same was originally invalid, by reason of the non-payment of the sums requisite to give it validity, at the time of making the subscription. Everhart *v.* West Chester & Ph. Railw. 28 Penn. St. R. 339.

And where commissioners were appointed, by an act of the legislature, and were authorized to receive subscriptions for the purpose of constructing a railway, no subscription to be valid, unless five dollars was paid upon each share at the time of subscribing; the act providing that when a certain number of shares shall have been so subscribed, and the same certified under the oath of the commissioners to the governor, he should issue letters-patent, incorporating the subscribers, and such as should thereafter subscribe, and this was done, and the company duly organized, it was held:

That the act imposed no restriction upon the corporation after it was organized, in regard to the payment of the five dollars at the time of subscription. That the condition that subscriptions should not be valid till a certain amount was subscribed, was one which the parties had a right to annex to the contract of subscription, and as such, was valid, and the subscriptions could not be enforced till the condition was performed. Philadelphia & West Chester Railw. *v.* Hickman, 28 Penn. R. 318.

9 Highland Turnp. Co. *v.* McKean, 11 Johns. R. 98; Grayble *v.* The York & Gettysburgh Turnp. Co. 10 Serg. & Rawle, 269. So also if one act as a stockholder in the organization of the company. Greenville & Columbia Railway *v.* Woodsides, 5 Rich. 145.

10 Klein *v.* Alton & Sangamon Railway, 13 Ill. R. 514.

11 Hall *v.* Selma & Ten. Railway, 6 Alabama, 741.

12 McRea *v.* Russell, 12 Ired. 224; Selma & Ten. Railway *v.* Hall, 5 Alabama, 787; Tracy *v.* Yates, 18 Barb. 152; Greenville & Columbia Railway *v.* Woodsides, 5 Rich. 145; Mitchell *v.* Rome Railway, 17 Georgia R. 574.

But upon the ground that, so far as the subscriber is concerned, the company may waive this condition, upon what is equivalent to payment, it ought also to be equally held, that when the subscriber has obtained such a waiver, for his own ease, he shall be estopped to deny, that it was so far a compliance with the charter as to render the contract binding.

5. And upon the other hand, the company having consented to accept the subscriber's promise, instead of money, for the first instalment, cannot defeat his right to be regarded as a stockholder, on account of his not complying with a condition, which they have expressly waived. It would seem, that under these circumstances, the immediate parties to the contract could not obtain any advantage over each other, by reason of the waiver, by mutual consent, of strict performance of such condition. But that the objection must come properly from some other quarter, either the *public, or the other shareholders. But possibly the cases decided upon this subject do not justify any such relaxation, even between the parties to the immediate contract of subscription. Upon general principles, applicable to the subject, as educed from the law of contracts, we see no objection to the waiver of such a condition on behalf of the company. And if there be any objection upon other grounds, it is not for the benefit of the subscriber.[13]

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[13] It has been held that the misstatement of the length of the road, in the articles of association, if there be no fraud; or the lease, or sale, of the franchises of the corporation to another company, which is void; or the neglect to make the whole road, even without legislative sanction, will not exonerate a subscriber from paying calls. Troy & Rutland Railway *v.* Kerr, 17 Barb. 581. But where a preliminary subscription is required, it must be absolute and not dependent upon conditions. Troy & Boston Railway *v.* Tibbitts, 17 Barb. 298. But a condition that provides for interest, by way of dividends, to paying subscribers, until the full completion of the road, at the expense of subscribers, who do not pay, or one that imposes a limitation upon the directors in calling in stock, is void as being against good policy. Id.

In a recent case in Kentucky, Wight *v.* Selby Railway, 16 B. Monr. 5, (1855,) it was held, that a subscription to stock, in a railway, is not rendered invalid, by reason of the subscriber's failure to pay a small sum, required by the charter to be paid, upon each share, when he subscribed. *Simpson*, J. "It was their duty to pay it, at the time the stock was subscribed, but they should not be allowed to take advantage of their own wrong, and release themselves from their whole obligation, by a failure to perform part of it." This seems to us a sound view of the subject, and the only one, which is consistent with the general principles of the law of contract, as applicable to the question.

*6. An agreement to take stock and pay in the stock of a canal company, and an offer of the canal stock, will not make the party liable to pay money.[14]

7. Infancy is a good defence, if the person be an infant at the time of suit brought, or if he repudiate the subscription, within a reasonable time after coming of full age.[15] By the general

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In this case it is further held, to be no valid defence to a subscription to the stock of a railway, that it was delivered as an escrow to one of the commissioners, appointed to receive subscriptions. It should have been delivered to a third person, to become effectual, as an escrow. Such subscribers are presumed to know the conditions of the charter, under which the subscription is taken, and that if they desire to make their subscriptions conditional, it must be so expressed in the written terms of subscription, and that it is not competent to deliver a written contract, as an escrow, to the party himself. For, to admit oral evidence of such a condition, in the delivery of a written contract to the party benefited thereby, is a practical abandonment of the rule of evidence, that such testimony is incompetent to control a written contract.

It has been held, that it is not competent for the commissioners to accept the check of a subscriber in payment of the amount, required by the charter to be paid, at the time of subscription, but that specie, or its equivalent, must be demanded. Crocker *v.* Crane, 23 Wend. 211; 2 Am. Railw. C. 484. But this is at variance with the general course of decision, unless in regard to banks, where the charter expressly requires the payment to be in specie. King *v.* Elliot, 5 Sm. & M. 428.

And where the charter of a railway company was made to depend upon the condition of the company expending $50,000 in two years, and completing the road in four years from the date of the grant, and the company having failed in the first part of the condition, but having obtained subscriptions to their stock to a large amount, and the defendant being one of the subscribers, the company having organized, and chosen directors, the defendant being one of them, the legislature revived and renewed the charter, and extended the time for the performance of such condition; and subsequently to this, a meeting of the stockholders was called by the commissioners, in which the defendant took part, additional directors being appointed, and at a meeting of the directors, the defendant being present, a call was made upon the subscriptions, it was held that this amounted to an acceptance of the renewal of the charter, and was such a recognition of the former organization of the company, as to amount to a sufficient organization under the new charter, and the defendant was held to be estopped by his conduct from denying the regularity of these proceedings, and to be liable to pay calls on his stock. Danbury & Norwalk Railway *v.* Wilson, 22 Conn. R. 435.

14 Swatara Railway *v.* Brune, 6 Gill, 41.

15 North W. Railway *v.* McMichael, 5 Exch. 114; Birkenhead Railway *v.* Pilcher, 5 Exch. 121; S. C. 6 Railw. C. 622. The party should also deny having derived any advantage from the shares, or offer to restore them. 5 Exch. 114;

provisions of the English statute, all persons may become shareholders, there being no exception, in terms, in favor of infants; and if one be registered while an infant, and suffer his name to remain on the register, after he becomes of full age, he is liable for calls, whether made while he was an infant, or afterwards.[16]

Leeds & T. Railway *v.* Fearnley, 4 Exch. 26; Dublin & W. Railway *v.* Black, 16 Eng. L. & Eq. R. 556.

[16] Cork & Bangor Railway *v.* Cazenove, 10 Q. B. 935. But it would seem that infants are not comprehended, by the general terms of the English statute. Birkenhead, &c. Railway *v.* Pilcher, *supra.*

It has been said that an infant shareholder, or subscriber, in a railway company, is in the same situation as in regard to real estate, or any other valuable property, which he may have purchased and received a conveyance of. If, upon coming of age, he disclaim the contract, and restore the thing, with all advantages arising from it, his liability is terminated, and he cannot be made liable for calls. *Parke*, B., in Birkenhead & C. Railway *v.* Pilcher, 6 Railw. C. 625. The infant is not regarded as merely assuming an executory undertaking, which is void on the face of it, but in the nature of a purchaser of what is presumed to be valuable to him.

Where, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls, it is insufficient. Id. It would seem that the plea should contain averments, showing the disadvantageous nature of the contract to the infant, his repudiation of the contract, and restitution of all benefits decreed under it, on coming of full age, or that he is still an infant, and is ready to do so, upon coming of full age. McMichael *v.* London & N. W. Railway, 6 Railw. C. 618; Birkenhead & C. Railway *v.* Pilcher, 6 Railw. C. 564, 662. The mere plea of infancy is an immaterial plea, and issue being joined thereon, and found for defendant, the plaintiff is still entitled to judgment *veredicto non obstante.* Id.

The plea must show that the infant avoids the contract of subscription, on his coming of full age. Leeds & Thirsk Railway *v.* Fearnley, 5 Railw. C. 644; 4 Exch. 26. And the appearance by attorney is not equivalent to an averment that the defendant is of full age. Id.

But where the plea alleged, that the defendant became the holder of shares, by reason of his having contracted and subscribed for them, and not otherwise; and that at the time of his so contracting or subscribing, and also at the time of making the calls, he was an infant; and that while he was an infant, he repudiated the contract and subscription, and gave notice to the plaintiffs, that he held the shares at their disposal; it was held a good *primâ facie* bar; and that if the defendant, after he came of full age, disaffirmed his repudiation, or if he become liable, by enjoyment of the profits, those facts should be replied. Newry & Enniskillen Railway *v.* Coombe, 3 Exch. 565; S. C. 5 Railw. C. 633.

Where shares were sold to an infant, and were duly transferred to him, on the declaration of the vendor that he was of full age, and the father of such infant, by a deed, reciting that he had purchased on behalf of the son, and covenanting that he, on coming of age, would execute the deed, and pay all calls, and that the father would indemnify the company against all costs, by reason of the son being

It seems to be * doubted by the English courts whether the statute of limitations as to simple contracts, applies to an action for calls, that being a liability imposed by statute, and so to be regarded as a specialty.[17]

8. Bankruptcy is a good defence for calls made after the certificate of bankruptcy issues, but to meet liabilities incurred before.[18]

* SECTION X.

FUNDAMENTAL ALTERATION OF CHARTER.

1. *Will release the subscribers to stock.*
2. *Railway company cannot purchase steamboats.*
3. 7. *Majority may bind company to alterations, not fundamental.*
4. *Directors cannot use the funds for purposes foreign to the organization.*
5. 9. *But where the legislature or the directors make legal alterations in the charter, or the location of the road, it will not release subscribers.*
6. *But if subscriptions are made upon condition of a particular location, it must be complied with.*
8. 9. *Consideration of subscription, being location of road, must be substantially performed. Express conditions must be performed.*

§ 56. 1. There can be no doubt, that subscribers to the stock of a railway company, are released from their obligation to pay calls, by a fundamental alteration of the charter. This is so undeniable, and so familiar a principle, in the general law of partnership, as not to require confirmation here. We shall briefly advert, to the points decided in some of the more prominent cases, in regard to incorporated companies. The general doctrine applicable to the subject, is very perspicuously stated, by *Woodbury*, J., in an early case in New Hampshire.[1] "Every owner of shares expects, and stipulates, with the other owners, as a corporate body, to pay them his proportion of the expenses, which a majority may please to incur, in the prosecution of the particular objects of the corporation. To make a valid change

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an infant, it was held that the father was a contributory. *Ex parte* Reaveley, 1 DeG. & S. 550. See also Stikeman *v.* Dawson, 4 Railw. C. 585.

17 Cork & B. Railway *v.* Goode, 24 Eng. L. & Eq. R. 245.

18 Chapple's case, 71 Eng. L. & Eq. R. 516.

1 Union Locks & Canal Co. *v.* Towne, 1 N. Hamp. 44. But where the original charter or preliminary contract provides for modifications, the subscribers are still bound by all such as come fairly within the power. Cork & Youghal Railroad *v.* Patterson, 37 Eng. L. & Eq. R. 398; *Post*, § 254, n. 6; Nixon *v.* Brownslow, 30 Law Times, 74.

in this special contract, as in any other, the consent of both parties is indispensable."

2. In an important case[2] where it appeared that after calls fell due, but before suit brought, the company, being incorporated for the purpose of building a railway, procured an additional special act, by which they were authorized to purchase steamboats: it was held, that a subscriber, not having assented to the alteration, was absolved from his obligation to pay calls.

3. In a very elaborate opinion of *Bennett*, Chancellor,[3] upon this subject, the following propositions are established:—

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[2] Hartford & New Haven Railway *v.* Croswell, 5 Hill, 383. In Winter *v.* Muscogee Railway, 11 Ga. 438, the charter was so altered as to allow the road to stop short of its original terminus and pass in a different route, and subscribers to the stock were held thereby released, unless they assented to the alteration. But where one gave his note for the first instalment, and his stock was forfeited, for non-payment of calls, he is not relieved from payment of his note by a material alteration of the charter. Mitchell *v.* Rome Railway, 17 Ga. R. 574.

[3] Stevens *v.* Rutland & Burlington Railway, 1 Law Register, 154. The opinion at length is a valuable commentary upon this important subject. In this opinion the learned chancellor maintains,—

1. That by the implied contract, among the proprietors of all joint-stock undertakings, there is a tacit inhibition against applying the funds, for any purpose beside the general scope of the original enterprise, and that this applies to corporations, equally with commercial partnerships. Natusch *v.* Irving, Gow on Part. App. 567. And that courts of equity will restrain a corporation from thus misapplying its funds by injunction. Ware *v.* Grand Junction Water Co. 2 Russell & Mylne, 461. And that this will be done upon the application of those shareholders, who dissent. And in some instances will restrain the company from applying to the legislature, for an enlargement of their powers. Cunliff *v.* Manchester & Bolton Canal Co. 13 Eng. Cond. Ch. R. 131; s. c. 2 Russell & My. 470, 475; Livingston *v.* Lynch, 4 Johns. Ch. R. 573.

2. That if the proposed alteration is only *auxiliary* to the main design of the original organization, it will not be enjoined; but if it be *fundamental*, it will be. That a variation in the course of a turnpike-road has been regarded, as a *fundamental* alteration in the charter, Middlesex Turnpike Co. *v.* Lock, 8 Mass. R. 268, and, as such, to exonerate subscribers to the stock of the original company. [But Irvine *v.* The Turnpike Co. 2 Penn. 466, holds it will not have that effect.] And that in such cases it will make no difference, that the subscriber was a director in the company, and joined in the petition to the legislature for the alteration. Same *v.* Swann, 10 Mass. R. 384; Same *v.* Walker, 10 Mass. R. 390.

The learned chancellor regarded the case of Revere *v.* The Boston Copper Co. which was cited, by the counsel for the defendants, as making rather against his purpose. 15 Pick. R. 351, 363. The case of Hartford & New Haven Railway *v.* Croswell, 5 Hill, 383, 385, is relied upon, as having defined a fundamental

*1. That a majority of a joint-stock company cannot use the joint property except within the legitimate scope of their charter,

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alteration of the charter of a corporation, in the language of Ch. J. *Nelson*, to be one "by which a new and different business is superadded to that originally contemplated."

3. No one can be made a member of a joint-stock corporation, without his consent. Ellis *v.* Marshall, 2 Mass. R. 269; nor can he be compelled to remain a member of such company, after its fundamental organization is altered by act of the legislature. But an act of the legislature allowing a navigation company to raise their dam above the point of the original charter limit, is in furtherance of the original grant, and will not exonerate the subscribers. Gray *v.* Monongahela Navigation Co. 2 Watts & Serg. R. 156. And an alteration in the number of votes, to be cast by stockholders, if it impair the obligation of the contract resulting from the grant, is void, and so cannot release the subscribers. Osborn *v.* Bank of United States, 9 Wheat. R. 738. But any statute which has the force to effect an alteration in the structure of the corporation, will release subscribers. Indiana & Ebensburgh Turnp. Co. *v.* Phillips, 2 Penn. 184.

4. That statutes extending the term of a corporation, for closing up its business, on petition of the directors, has no proper bearing upon the question. Lincoln & K. Bank *v.* Richardson, 1 Greenl. R. 79; Foster *v.* The Essex Bank, 16 Mass. R. 245.

5. That it is no fatal objection to the application, that it is made at the instigation of a rival enterprise. Coleman *v.* Eastern Counties Railway, 10 Beavan, 1. [But see *ante*, § 20.]

6. That an existing railway company will be restrained in equity from applying its present funds, to extend their line, or improve the navigation of a river connected with their line, or for obtaining an act of the legislature, authorizing them to do so. Hunt *v.* Shrewsbury & Chester Railway, 3 Eng. L. & Eq. R. 144; Coleman *v.* Eastern Co.'s Railway, 10 Beavan, 1.

7. That members of an existing company cannot be compelled to surrender their interest to the company, or to others, and retire, in order to enable them to change the character of the enterprise. Lord *Eldon*, Chancellor, in Natusch *v.* Irving, *supra*.

8. In favor of the importance and necessity of having this constant supervision exercised over joint-stock companies, in order to keep them within the range of their legitimate functions, the learned chancellor thus concludes:—

"Where it is clearly shown that a corporation is about to exceed its powers, and to apply their funds or credit to some object beyond their authority, it would, if the purpose of the corporation was carried out, constitute a breach of trust; a court of equity cannot refuse to give relief by injunction. Agar *v.* The Regent's Canal Co. Cooper's Eq. R. 77; The River Dun Navigation Co. *v.* North Midland Railway Co. 1 Railw. C. 153, 154. The last case was before the lord chancellor, and he uses this language: 'If these companies go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers, interfere with the property of individuals, this court *is bound* to interfere; and that was Lord *Eldon's* ground in Agar *v.* The Regent's Canal Co.' The lord chancellor

*and if they attempt to do so equity will restrain them. 2. The shareholders are bound by such modifications of the charter, as are not fundamental, but merely auxiliary to the main design. 3. If a majority of a railway company obtain an alteration of their charter, which is fundamental, as to enable them to build an extension of their road, any shareholder who has not assented to the act, may restrain the company, by injunction, from applying the funds of the original organization to the extension.

4. In a late case before the Master of the Rolls,[4] it was held,

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further adds: 'I am not at liberty (even if I were in the least disposed, which I am not) to withhold the jurisdiction of this court, as exercised in the case of Agar *v.* The Regent's Canal Co.' In that case Lord *Eldon* proceeded simply on the ground that it was necessary to exercise this jurisdiction of chancery, for the purpose of keeping these companies within the powers which the acts give them. And it is added: 'And a most wholesome exercise of the jurisdiction it is; because, great as the powers necessarily are, to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there was not a jurisdiction continually open, and ready to exercise its power to keep them within their legitimate limits.'

"The injunction must, therefore, be allowed; but only so far as to restrain the defendants, until the further order of the chancellor, from applying the present funds of the corporation, or their income from their present road, either directly or indirectly, to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it; and also from using or pledging, directly or indirectly, the credit of the corporation in effecting the object of the extension; and at the same time, the company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object." See also Gifford *v.* New Jersey Railw. 2 Stockton's Ch. R. 171, where this subject is examined somewhat at length by the chancellor, and the conclusion arrived at, that it is competent for a court of equity to interfere in the management and application of the funds of a corporation, at the instance of a single stockholder; that the legislature may give additional power from time to time to corporations, and that such acts are binding, unless they conflict with vested rights, or impair the obligation of contracts. That a stockholder in an existing corporation, has a vested right in any exclusive privilege of the corporation which tends to enhance the value of its stock, and that he would not be bound by any act of the legislature tending to produce such effect, without his consent; but that such consent will be inferred from long acquiescence, which is equivalent to express consent. *Post*, § 174, n. 7.

[4] Colman *v.* Eastern Counties Railway, 4 Railw. C. 513. See also Munt *v.* Shrewsbury & Chester Railway, 3 Eng. L. & Eq. R. 144; East Anglian Railway *v.* Eastern Counties Railway, 7 Eng. L. & Eq. R. 505; MacGregor *v.* Deal & Dover Railway, 16 Eng. L. & Eq. R. 180; Danbury & Norwalk Railway *v.* Wilson, 22 Conn. R. 435; Mill-Dam Co. *v.* Dane, 30 Maine, 347; *Post*, § 235; Win-

that directors have no right to enter into, or to pledge the funds of the company in support of any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. And that acquiescence by shareholders in a project for ever so long time, affords no presumption of its legality. And in a late case in this country it is held, that the subscriber having acted as director of the corporation, and as such having participated in the proceedings to effect the alteration, will not make him liable for calls, upon his original subscription.[5]

5. But it is no defence to an action for calls, that the directors have altered the location of the road, if by the charter they had the discretion to do so.[6] And if the charter contain a provision that the legislature may alter, or amend the same, the exercise of this power will not absolve the shareholders from their liability to pay calls.[7] And all subscriptions to stocks, and all contracts for the *purchase of stock, to be delivered at a future day, must be understood to be made subject to the exercise of all the legal powers, of the directors and of the legislature, and an illegal exercise of power by either will, it has sometimes been said, bind no one, and should exonerate no one from his just obligations.[8]

6. But where subscriptions are made upon the express condition, that the road shall go in a particular place, the performance of such condition is commonly regarded, as indispensable to the liability of the subscribers, the same as in other contracts.[9] But an alteration in the line of the road, which does not affect

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ter *v.* Muscogee Railway, 11 Ga. 438; Hamilton Plank Road *v.* Rice, 7 Barb. 157; Commonwealth *v.* Cullen, 1 Harris, 133; 3 Woodbury & Minot, 105.

[5] Macedon Plank Road Co. *v.* Lapham, 18 Barb. 312. But see Greenville & Columbia Railway *v.* Coleman, 5 Rich. 118.

[6] Colvin *v.* The Turnpike Co. 2 Carter, 511; Id. 656.

Nor is it a defence to an action for calls, that the name of the company, or the length and termini of the road, have been materially altered. Del. & Atlantic Railway *v.* Irick, 3 Zab. 321.

[7] Northern Railway *v.* Miller, 10 Barb. 260; Pacific Railway *v.* Renshaw, 18 Missouri, 210.

[8] Irvine *v.* Turnpike Co. 2 Penn. 466; Conn. & Pas. Rivers Railway *v.* Bailey, 24 Vt. R. 479. Faulkner *v.* Hebard, 26 Vt. R. 452.

[9] See cases under notes 2 & 3, *supra;* and also Railsback *v.* Liberty & Abington Turnp. Co. 2 Carter (Ind.) 656.

the interest of the subscriber, will not absolve him from his subscription.[10]

7. And an alteration in the charter, which consists only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute, what may be regarded as substantially the original object of its creation, will not exonerate subscribers to the stock of the company.[11] So too where the general laws of the state provide that all acts of incorporation may be altered, amended, or repealed by the legislature, it is no defence to a subscription for stock, that subsequently the legislature increased the liability of the stockholders.[12]

8. And notwithstanding much apparent conflict in the cases, upon this subject, it will be found to be the general result of the best considered cases, that the alteration, either in the charter of the company, or the line of the road, to exonerate the subscriber for stock, must be one which removes the prevailing motive for the subscription, or else materially and fundamentally alters the responsibilities and duties of the company, and in a manner not provided for, or contemplated, either in the charter itself or the general laws of the state.[13]

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[10] Banet *v.* Alton & Sangamon Railway, 13 Ill. 504; Danbury & Norwalk Railway *v.* Wilson, 22 Conn. R. 435.

[11] Pacific Railway *v.* Hughs, 22 Missouri, 291; Peoria & Oquawka Railway *v.* Elting, 17 Ill. R. 429. In Everhart *v.* West Chester & Philadelphia Railw. 28 Penn. St. R. 339, the subscribers for stock were held not released by such a change in the charter of the company, as enabled them to issue preferred stock, to enable them to raise the means of making and equipping the road, in the manner originally contemplated. It was considered that such an amendment of the charter was merely ancillary to the main design, and might be accepted by a majority of the stockholders and thus become binding upon all; that it is implied in every subscription for the stock in a railway company, that they may resort to the ordinary and legal means, for accomplishing the object proposed by the charter.

It is here said, that an alteration of the charter, which superadds an entirely new enterprise, will release subscriptions to the stock.

[12] South Bay Meadow Dam Co. *v.* Gray, 30 Maine R. 547.

[13] But in the Greenville & Columbia Railway *v.* Coleman, 5 Rich. 118, where the charter gave the stockholders the right to designate the route they preferred, and if any stockholder was dissatisfied with the route selected, the right to withdraw his subscription, "provided, at the time of subscribing, he designated the route he desires to be selected," and one subscribed, without designating the route he preferred, under an assurance from one, who was soliciting subscrip-

*9. Where a town, or city, stipulate with a railway company, for adequate consideration to terminate their route, at a point, beneficial to such town or city, this will not preclude the company from forming connections with other routes, by land, or water, at the same point.[14]

10. And where the plaintiff made it a condition of his subscription to the capital stock of a railway, that it should pass through some portion of the counties of Monroe and Ontario, and the road was so located as not to touch either of those counties, it was held, that he was released from his subscription.[15]

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tions, that he might pay $5, on a $100, and be free from liability, as to the residue, it was held, that he was liable, as a stockholder, without the right to withdraw. But some of the American cases do not seem to recognize any alteration in the route of the road, even one which renders it practically a different enterprise, as a defence to subscriptions for stock. Central Plank Road Co. *v.* Clement, 16 Mo. R. 359.

[14] Baltimore & Ohio Railway *v.* Wheeling, 13 Grattan, R. 40.

[15] Buffalo, Corning, & N. Y. Railway *v.* Pottle, 23 Barb. 21. And where a party, who was not a stockholder, executed a promissory note to a railway company, promising to pay them $200, in consideration that they would locate their depot in block 94, in Indianapolis, to be paid when the company should commence the construction of their depot, and the line of the company's road extended from Terre Haute, through Indianapolis, to Richmond, a distance of 150 miles, at the date of the note, but by subsequent act of the legislature, was divided, at Indianapolis, and the portion between Indianapolis and Richmond, being about one half, was given to another company, which built their depot in another portion of Indianapolis, the former company only constructing a freight depot, on block 94, it was

Held, that by the alteration of the charter of the Terre Haute and Richmond Railway Company, and the acceptance thereof, by the company, the company became substantially a different corporation, and were unable to perform the condition, upon which the note was to become payable, and that the circumstance, that the depot located on block 94 was of some advantage to the plaintiff in error, was of no importance.

But an amalgamation of two railway companies, effected subsequent to the date of a subscription to the stock of one of them, but which had been authorized by an act of the legislature prior to that time, will not release the subscription. And it is of no importance, that the consolidation took place, without the knowledge of the subscriber. Sparrow *v.* Evansville & Crawfordsville Railway, 7 Porter (Ind.) R. 369.

The subscription of stock to an amalgamated company is a sufficient consent to the amalgamation. And such consent by the stockholders seems to be regarded as requisite to the power of the legislature to amalgamate existing railway companies. Fisher *v.* Evansville & Crawfordsville Railway, 7 Porter (Ind.) R. 407.

*SECTION XI.

SUBSCRIPTIONS BEFORE DATE OF CHARTER.

1. *Subscriptions before date of charter good.*
2. *Subscriptions upon condition not performed.*
Note 4. *Where the condition is performed.*

§ 57. 1. It has been held that one who subscribes before the act of incorporation is obtained, and by parity of reason, before the organization of the company, although after the act of incorporation, is holden to the corporation, to pay the amount of his subscription. And a suit is sustainable, in their name, upon any securities given in the name of the association, or of the commissioners for organizing the company, and equally upon the subscription itself in the name of the corporation.[1] And it is not competent for one, who is a subscriber to such an enterprise, to withdraw his name while the act of incorporation is going through the legislature.[2]

2. But an informal subscription, which is never carried through the steps necessary to constitute the subscribers members of the company, has been held inoperative, as no compliance with the act.[3] And a subscription, upon condition that the road is built through certain specified localities, the company at the time not assuming to build the road through those places, will not, it has been held, make the subscriber liable to an action for calls, even if the condition be ultimately performed by the company.[4] But

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[1] Kidwelly Canal Co. *v.* Raby, 2 Price, Exch. R. 93; Selma & Tenn. Railway Co. *v.* Tipton, 5 Alabama R. 786; Vermont Central Railway Co. *v.* Clayes, 21 Vt. R. 30; Delaware & Atlantic Railway *v.* Irich, 3 Zab. 321.

In the last case the very point ruled, is, whether the company were proper plaintiffs, in an action to enforce calls against one, who signed the commissioners' paper for shares, before the organization. Held, the commissioners were to be regarded as agents of the company. See also Troy & Boston Railway *v.* Tibbitts, 18 Barb. 297; Stanton *v.* Wilson, 2 Hill, 153; Troy & Boston Railway *v.* Warren, 18 Barb. 310; Hamilton Plank Road Co. *v.* Rice, 7 Barb. 157; Stewart *v.* Hamilton College, 2 Denio, 417; Danbury & N. Railway *v.* Wilson, 22 Conn. 435. So also a subscription to the capital stock of a railway, made on the solicitation of one, who was not a commissioner, but who felt an interest in the road, and volunteered to take up subscriptions to its stock, was held valid in a very recent case. Railroad Company *v.* Rodrigues, 10 Rich. (S. C.) R. 278.

[2] Kidwelly Canal Co. *v.* Raby, 2 Price, Exch. R. 93.

[3] Troy and Boston Railway *v.* Tibbitts, 18 Barb. 298.

[4] Macedon & Bristol Plank R. *v.* Lapham, 18 Barb. 313. In this last case it

one * might perhaps raise some question, whether, upon general principles, such a subscription ought not to be binding, as a

seems to have been decided that such a subscription is not good, as a subscription for stock, not upon the ground mainly that it was conditional and so against public policy, or from want of mutuality, but upon the ground of an extension of the road and an increase of the capital stock. But see also Utica & Sch. Railway *v.* Brinkerhoff, 21 Wend. 139, where such a decision is made. But the current of authority, both English and American, is almost exclusively in a counter direction. It is impossible, upon any fair ground of construction, to consider such a subscription, where the road is located in a given line, in faith, and in fulfilment of the condition, as a mere offer, unaccepted. It is a proffer, a proposal, accepted, and as much binding as any other possible consideration. But if it were to be regarded as a mere offer, standing open, upon every principle of reason and law, when accepted, according to its terms, it is binding as a contract and no longer revocable, and the only case, of much weight, which ever attempted to maintain the opposite view, that of Cooke *v* Oxley, 3 T. R. 653, has been regarded as overruled upon that point for many years. See L'Amoreaux *v.* Gould, 3 Selden, 349; Conn. & Passumpsic Rivers Railway *v.* Bailey, 24 Vt. R. 478.

In the case of Boston & Maine Railway *v.* Bartlett, 3 Cush. R. 224, the subject is very justly illustrated by Mr. Justice *Fletcher:* "In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant, but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

"But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once.

"A different doctrine, however, prevails in France, and Scotland, and Holland. It is there held, that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But, whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

standing * offer accepted and acted upon by the company, which is sufficient consideration for the promise.[5]

SECTION XII.

SUBSCRIPTION UPON SPECIAL TERMS.

1. *Subscriptions not payable in money.*
2. *Subscriptions at a discount, not binding.*

Note 2. *Contracts to release subscriptions not binding.*

§ 58. 1. It is well settled, that a railway, or other joint-stock company, cannot receive subscriptions to their stock, payable at less sums, or in other commodities, than that which is demanded of other subscribers. Hence subscriptions, payable in store-pay, or otherwise than in money, will be held a fraud upon the other subscribers, and payment enforced in money.[1]

" The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text-books. The case of Cooke *v.* Oxley, 3 T. R. 653, in which a different doctrine was held, has occasioned considerable discussion, and, in one or two instances, has probably influenced the decision. That case has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But, however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

" As, therefore, in the present case, the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled."

5 See this subject more fully discussed in §§ 51, 55, *ante*.

1 Henry *v.* Vermilion & Ashland Railway Co. 17 Ohio R. 187. But in a recent case, Philadelphia & West Chester Railw. *v.* Hickman, 28 Penn. R. 318, it is said the company may compromise subscriptions for stock, which are doubtful, upon receiving part-payment; or may receive payment in labor or materials, or in damages which the company is liable to pay, or in any other liability of the corporation. The certificates of stock in this case were issued to the contractors, in part-payment of work done by them upon the road; to others, in part-payment for a locomotive, for sleepers, for land-damages, and for cars. We do not understand how there can be any valid objection to receiving payment for subscriptions to the capital stock of a railway company in this mode, if the shares, so disposed of, are intended to be reckoned at their fair cash value, at the time of the contract being entered into. It is certain, contracts of this kind have been very

2. So too in a case where subscriptions to stock of such a company are, by the agents of the company, agreed to be received at a discount, below the par value of the shares, it will be regarded as a fraud upon the other shareholders, and not binding upon the company.[2]

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generally recognized by the courts as valid, and no fraud upon the other subscribers.

[2] Mann *v.* Cooke, 20 Conn. R. 178. In this case the defendant subscribed for forty shares in the capital stock of a railway company, upon condition that all future calls should be paid, as required, or the shares should become the property of the company. He thereupon received certificates of ownership of the forty shares, the special terms of his subscription not being known to the other subscribers.

Some time afterwards, the company being largely indebted, and insolvent, and the greater part of the instalments on its stock being unpaid, the president made an arrangement with defendant that he should immediately pay the instalments on twenty shares of his stock, in full, and he was thereupon to be discharged from all liability on the other twenty shares. Defendant complied with these terms, and the money paid went for the benefit of the company.

The plaintiff was appointed receiver of the effects of the company, and brought this bill in equity to obtain payment of the balance due upon the other twenty shares, and it was held:—

1. That the subscription for the stock was in legal effect the same as an ordinary subscription for stock, without condition.

2. That the arrangement made with the president of the company was void, as a fraud upon stockholders and creditors.

3. That the company, being created for public purposes, could not receive subscriptions, under a private arrangement, at less than the par value of the stock, as this would deprive the company of so much of its available means, and thus operate, as a fraud, upon all parties interested.

But where one paid for stock in a railway company, under a secret agreement with the commissioner of contracts, that he might receive land of the company, at a future day, and pay in the stock certificate, and the company declined to ratify the contract, it was held the subscriber was released from his portion of the contract, and might recover the money he paid for the stock of the company. Weeden *v.* Lake Erie & Mad River Railway, 14 Ohio, 563. But in the case of the Cincinnati, Indiana, & Chicago Railway *v.* Clarkson, 7 Ind. R. 595, it seems to be considered, that the company are bound by a contract to compensate a solicitor of subscriptions to the capital stock, payable in land, but no question is made in regard to the validity of the subscriptions. The solicitors were ordered by the directors to accept such subscriptions, and were to have two per cent. on all which were accepted by the company, and the contract was held binding upon the company. An agreement by a railway company, that a subscriber for stock may pay the full amount, or any part of his subscription, and receive "interest thereon until the road goes into operation," does not oblige the company *to pay* interest before the road goes into operation. Waterman *v.* Troy & Greenfield Railway, 20 Law R. 351.

*SECTION XIII

EQUITABLE RELIEF FROM SUBSCRIPTIONS OBTAINED BY FRAUD.

1. *Substantial misrepresentations in obtaining subscriptions will avoid them.*
2. *But for circumstantial misconduct of the directors, in the matter, they alone are liable.*
3. *Directors cannot make profit for themselves.*

§ 59. 1. The directors of a railway company, who make representations on behalf of the company, to induce persons to subscribe for the stock, so far represent the company, in the transaction, that if they induce such subscription, by a substantial fraud, the contract will be set aside, in a court of equity.[1] The proper inquiry in such case is, "Whether the prospectus, so issued, contains such *representations, or such suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe, the plaintiff would not have entered into the contract, that is, that he would not have taken the shares allotted to him, and those which he purchased."[2]

2. But the omission to state in a prospectus the number of

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[1] Sir John Romily, M. R., in Pulsford *v.* Richards, 19 Eng. L. & Eq. R. 392. The prospectus issued in such cases is to be regarded as a representation. And where one is induced to take shares in a joint-stock company, through the false and fraudulent representations of the directors, he is not liable to calls for the purpose of paying the expenses of the company. The Royal British Bank, Brockwall's case, 29 Law Times, 375.

And where one of the directors of a company put the name of an extensive stockholder in the company, who resided in a foreign country, to a new subscription, for forty additional shares, without consultation with such person, upon the belief that he would ratify the act, and, upon being informed of such act, he made no objection for the period of nearly seven years, during which time the company had applied the dividends upon his stock, in payment of such subscription, having no intimation of any dissent upon his part, it was held the subscription thereby became binding, and that the party could not recover such dividends of the company. Philadelphia, Wilmington, & Baltimore Railw. *v.* Cowell, 28 Penn. St. R. 329.

[2] Pulsford *v.* Richards, 19 Eng. L. & Eq. R. 392; Jennings *v.* Broughton, 19 Eng. L. & Eq. R. 420. One, to entitle himself to be relieved from his subscription, must show that he acted, upon the false representations of the directors, in a matter of fact, material to the value of the enterprise, and not upon the mere speculation of the directors, or upon his own exaggerated expectations of the prospective success and value of the undertaking.

See also, upon this general subject, the remarks of the Master of the Rolls, p. 427.

shares taken, by the directors, or other persons, in their interest, is no such fraud as will enable a subscriber to avoid his subscription.[2] The fact that the directors of the company had entered into a contract with one, as general superintendent of construction, for four per centum upon the expenditure; and that this was an exorbitant compensation, and was, in fact, intended to compensate such person for his services, in obtaining the charter, and that this is not stated in the prospectus, is no such suppression as will exonerate subscribers for stock. "There was not the suppression of a fact, that affected the intrinsic value of the undertaking. That value depended upon the line of the projected railway, the population, the commercial wealth, the traffic of the places through which it passed, the difficulties of the construction, and the cost of the land required. Extravagance in the formation of a line of railway is a question of liability of the individual directors to the shareholders, but not a ground for annulling the contract between them."[2]

3. But the learned judge here suggests, with great propriety, that if the directors have made contracts, in the course of the performance of their duties, from which advantage is expected to arise to themselves, or to others, for their benefit, mediately, or immediately, they may, in a court of equity, be made to stand in the place of trustees to the shareholders.[3]

*SECTION XIV.

FORFEITURE OF SHARES. RELIEF IN EQUITY.

1. *Requirements of charter and statutes must be strictly pursued.*
2. *If not, equity will set aside the forfeiture.*
3. *Must credit the stock, at full market value.*
4. *Provisions of English statutes.*
5. *Evidence must be express, that all requisite steps were pursued.*

§ 60. 1. The company, in enforcing the payment of calls by forfeiture of the stock, must strictly pursue the mode pointed out in their charter and the general laws of the state. This is a rule of universal application to the subject of forfeitures, and one which the courts will rigidly enforce, and more especially, where the forfeiture is one of the prescribed remedies, given to the party, and against which equity does not relieve, when fairly exercised.[1]

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3 *Post*, § 179.

1 Sparks *v.* Liverpool Water Works, 13 Vesey, 428; Pendergrast *v.* Turton, 1

2. But as the company, in such case, ordinarily stand in both relations, of vendor and vendee, their conduct, in regard to fairness, will be rigidly scrutinized, and the forfeiture set aside in courts of equity, upon evidence of slight departure from perfect fairness.

3. Hence where the company declared the stock cancelled, and credited the value at a less sum than the actual market price, at the time, but more than it would probably have sold for, if that number of shares had been thrown, at once, into the market, the court set aside the forfeiture, on the ground that the company were bound to allow the highest market price, which could be obtained, without speculating on what might be the effect of throwing a large number of shares into the market.[2]

4. By the English statute the company are not allowed to forfeit a larger number of shares, than will produce the deficiency required.[3] And upon payment to the company of the amount of arrears of *calls, interest, and expenses, before such forfeited shares are sold by them, the shares revert to the former owner.[3]

5. The evidence of the company having pursued the requirements of their act, in declaring the forfeiture, must be express and not conjectural.[4]

Younge & Coll. N. R. 98, 110–112. This case is put mainly upon the ground of delay and acquiescence, but there is little doubt, it would have been maintained, upon the general ground stated in the text. See Edinburgh, Leith, & N. H. Railway *v.* Hibblewhite, 6 M. & W. 707; 2 Railw. C. 237.

But where the deed of settlement of a joint-stock company provides for a forfeiture of the shares without notice to the subscriber, the forfeiture determines the title without notice. Stewart *v.* Anglo-California Gold Mining Co. 14 Eng. L. & Eq. R. 51.

[2] Stubbs *v.* Lister, 1 Y. & Coll. N. C. 81.

[3] 8 & 9 Vict. ch. 16, § 34, 35.

[4] Cockerell *v.* Van Dieman's Land Co. 36 Eng. L. & Eq. R. 405.

*CHAPTER X.

RIGHT OF WAY BY GRANT.

SECTION I.

OBTAINING LANDS BY EXPRESS CONSENT.

1. *Leave granted by English statute.*
2. *Persons under disability.*
3. 11. 2. *Money to take the place of the land.*
4. *Consent to pass railway.*
5. *Duty of railway in all cases.*
6. *License to build railway. Extent of duration.*
7. *Company bound by conditions in deed.*
8. *Parol license good, till revoked.*
9. *Sale of road no abandonment.*
10. *Deed conveys incidents; not explainable.*

§ 61. 1. The English statute[1] enables railway companies to purchase, by contract with the owners, "all estates or interests (in any lands) of what kind soever," if the same, or the right of way over them, be requisite for their purposes.

2. And by another section of the same statute such companies are empowered to purchase such lands of persons legally incapacited to convey the title, under other circumstances, as guardians of infants, committees of lunatics, trustees of charitable or other uses, tenants in tail, or for life, married women, seized in their own right, or entitled to dower, executors or administrators, and all parties, entitled, for the time being, to the receipt of the rents and profits.[2]

*3. The valuation in this latter class of cases is to be made

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[1] 8 and 9 Vict. ch. 18, § 6.

[2] Hutton *v.* The London & South W. Railway, 7 Hare, 264. Some suggestions are here made by Vice-Chancellor *Wigram* in regard to the time within which it is requisite to make compensation in the several modes of taking lands. The principal question decided is, that in regard to lands, injuriously affected, by railway works upon other lands, it is not requisite to make compensation in advance. But where lands are purchased from persons under disability, the course of devolution of the property is not thereby changed, but the money paid, in compensation, is to take the place of the land, and to be treated as real estate. Midland Counties Railway *v.* Oswin, 3 Railw. C. 497; *Ex parte* Flamank, 1 Simons (N. S.) 260; *In re* Horner's Estate, 13 Eng. L. & Eq. R. 531; *In re* Stewart's Estate, 13 Eng. L. & Eq. R. 533.

by disinterested persons and the price paid into the bank, for the benefit of the parties interested.

4. And where a railway act provided, in terms, that nothing therein should authorize the company to do any damage or prejudice to the lands, estate, or property of any corporation or person whatsoever, without the consent in writing of the owner and occupier, it was held they could not pass the line of another railway without their consent, although the withholding of such consent should frustrate the purpose of the grant.[3]

5. In this country most of the railway charters contain a power to the company to acquire lands, by agreement with the owner. In such case it has been held the rights of the company are the same, as where they take the land under their compulsory powers.[4] And they are bound to the same care in constructing their road.[4]

6. And where the railway have the power to take five rods, through the whole course of their line, and a land-owner deeds them the full right to locate, construct, and repair, and forever maintain and use their road over his land, if in laying the drains or ditches through the land, it becomes necessary to go beyond the limits of the five rods, in order to guard against the effect of a stream to be passed, the company may lawfully do so under the grant.[5]

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3 Clarence Railway *v.* Great North of England Railway, 4 Queen's Bench, R. 46; Gray *v.* The Liverpool & Bury Railway, 4 Railw. C. 235.

4 Whitcomb *v.* Vermont Central Railway, 25 Vt. R. 49, 69. This right to acquire lands, by contract with the owners is, by implication, if not expressly, limited to the necessities of the company, we presume, the same, as taking lands *in invitum*, and cannot be extended to any private use. But if the owner of the land consent to the use, the constitutional objection is removed, and the right to hold the land, is a question between the company and the public, probably. Dunn *v.* City of Charleston, Harper, 189; Harding *v.* Goodlet, 3 Yerg. 41; 11 Wend. 149; Embury *v.* Conner, 3 Comstock, 516.

5 Babcock *v.* The Western Railway, 9 Met. 553. But a contract with the owner of land, for leave to build the road through his land, and staking out the track through the land is no such occupation as will be notice of the right of the company against a subsequent mortgagee. Merritt *v.* Northern Railway, 12 Barb. 605. But the payment by the company of the price of the land, and changing their route in faith of the title, might give them an equity superior to that of a subsequent mortgagee. Ib. The deed of one tenant in common is a good release of his claim for damages, although it convey no right, as against his co-tenant. Draper *v.* Williams, 2 Mich. 536.

*7. In case of a deed to a railway company of land, on which to construct their road, the assent of the company will be presumed, and they are bound by the conditions of the grant, as that the road shall be so constructed as not to interfere with buildings on the land.[6]

8. An oral permission to take and use land for a railway is a bar to the recovery of damages for such use, until the permission is revoked.[7] But a mere license to build works connected with a railway, the damages to be settled with a person named, or "on equitable terms hereafter," does not amount to any definite agreement.[8]

9. Where land is conveyed, for the use of a railway, upon condition, that it shall revert to the owner upon the abandonment of the road, and the road was sold, under a mortgage, to the state, and by the state, and by new companies chartered for that purpose, completed, it was held, that the grantor was not entitled to hold the land.[9]

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[6] Rathbone *v.* Tioga Navigation Co. 2 Watts & Serg. 74. And the rights and duties of the company, in such case, are precisely the same as if the land had been condemned, by proceedings in *invitum*, under the statute. Norris *v.* Vt. Central Railway, 28 Vt. R. 99.

[7] Miller *v.* Auburn & Syracuse Railroad, 6 Hill, 61. And such license, when executed, by the construction of the work, is not allowed to be revoked. The only relief the party is entitled to is compensation for his land. Water Power *v.* Chambers, 1 Stock. Ch. R. 471.

[8] Fitchburg Railway *v.* Boston & Maine Railway, 3 Cush. 58.

[9] Harrison *v.* Lexington & Ohio Railway, 9 B. Mon. 470. So too if land is conveyed, on condition, that an embankment, (water tight,) over a brook crossing the land, shall be erected by the grantors, and that the embankment, or dam, with the floodgates or sluices therein might be used, for hydraulic purposes, by the grantors, their heirs, and assigns, the grantees not to be liable to the grantors, for any damage they might sustain, by a break in such dam, unless the same should happen through the gross neglect, or wilful misfeasance of the grantees, but that the grantees should repair the dam forthwith; it was held to be a condition subsequent, the failure to perform which would give the grantors, or their heirs, a right of reëntry, at their election. But it was further said, that the conveyance of the estate by the grantees defeated the condition, and that the assignee had no remedy upon it. Underhill *v.* Saratoga and Wash. Railw. 20 Barb. 455. And such conditions may be waived by the party, in whose favor they are made, as in a grant of land for a railway track, the road to be completed, by a day named, or the deed to be void, which was not done; but the grantor continued to treat the company, as having the right to use the land for the purposes of the grant, and it was held a waiver of the condition. Ludlow *v.* New York & Harlaem Railway, 12 Barb. 440.

10. Where land was conveyed to a railway company, for the purpose of constructing their road, on which was a tenement, and to this, water was conveyed by an aqueduct from another portion *of the land of the defendant, and the price of the land was fixed, by the commissioners, the defendant at the time claiming the right to withdraw the water, and this not being objected to by the president, and engineer of the company, who were present, at the time, it was held, that the deed containing no exception, in regard to the water, the company acquired the right to its use, in the manner it had been before used, and the defendant was liable to an action for diverting it,[10] and the intention of the parties could not be determined by extraneous evidence.

SECTION II.

SPECIFIC PERFORMANCE IN EQUITY.

1. *Contracts before and after date of charter.*
2. *Contracts where all the terms not defined.*
3. *Contracts for land, umpire to fix price.*
4. *Where mandamus also lies.*
5. *Contracts not signed by company.*
6. *Where terms are uncertain.*
7. *Contracts giving the company an option.*
8. *Contracts not understood by both parties.*
9. *Order in regard to construction of highways may be enforced at the suit of the municipality.*

§ 62. 1. There can be no doubt courts of equity will decree specific performance of contracts for land, made by consent of the owners, as well after the act of parliament as before.[1]

2. If the agreement contains provisions for farm crossings, fences, and cattle-guards, either express or implied, the master will be directed to make the proper inquiry, and any decree for specific performance should provide minutely for all such incidents.[2] But, upon general principles, if the agreement provide, that the price of land is to be fixed, by an arbitrator or umpire, it has generally been held, that a suit for specific performance is not maintainable.[3]

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10 Vermont Central Railway *v.* Hills, 23 Vt. R. 681.

1 Appendix A, § 13, *et seq.;* Walker *v.* The Eastern Counties Railway Co. 5 Railw. C. 469; s. c. 6 Hare, 594.

2 Sanderson *v.* Cockermouth & Washington Railw. Co. 19 Law Jour. Ch. 503; 11 Beavan, 497.

3 Milnes *v.* Gerry, 14 Vesey, 400. But in this case the umpire was not agreed upon, and the court held they could not appoint one. But the Master of the Rolls held that an agreement to sell, at a fair valuation, may be executed.

3. But if the arbitrator have acted and fixed the price,[4] and by parity of reason, if the umpire is named, and ready to act, there *being no power of revocation, a court of equity may decree specific performance. Hence in the case above,[1] the Vice-Chancellor held, that, as the contract was, to take the land, on the terms prescribed in the act of parliament, the court had the means of applying those terms, so as to get at the price, and might therefore require the party to put them in motion, and then, in its discretion, decree specific performance.

4. And the consideration, that possibly the party might proceed, by mandamus, will not deprive him of this remedy, in equity, unless the act specially provides the remedy, by mandamus.[5]

5. But if the company take a bond of a land-owner, to convey so much land as they shall require, and subsequently appropriate the land, but decline accepting a deed and paying the price, equity will not decree specific performance of the contract, the bond not being signed by the company.[6] But in such a case specific performance will be decreed against the party signing the bond upon refusal.[7]

6. A contract to sell a railway company "the land they take" from a specified lot of land, at twenty cents a foot, "for each and every foot so taken by said company," imports a taking by the company, under their compulsory powers, and will not be specifically enforced, until so taken by the company. And if the terms of a contract are doubtful, a court of equity will not decree specific performance.[8]

7. Where one contracts with a railway company, under seal, to permit them to construct their road over his land, in either

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[4] Brown *v.* Bellows, 4 Pick. 179.

[5] Hodges on Railways, 189.

[6] Jacobs *v.* Peterborough & Shirley Railway, 8 Cush. 223.

[7] Parker *v.* Perkins, 8 Cush. 318.

[8] Boston & Maine Railway *v.* Babcock, 3 Cush. 228; 1 Am. Railw. C. 561. But a contract with a railway company, giving them all the land they desired, not exceeding four poles in width, upon which to construct their road, "provided said road shall not run further north of my southwest corner than ten feet, and not further south of my northeast corner than 140 feet," it was held, the company had a right to 66 feet through the whole land, and were only restricted in relation to the distance the road went from the corners named. Lexington & Ohio Railway *v.* Ormsby, 7 Dana, 276.

one of two routes, and to convey the land after the road shall be definitively located, with a condition that the deed shall be void, when the road shall cease, or be discontinued, if the company take the land and build their road upon it, specific performance will be decreed, although the company did not expressly bind themselves to *take the land, or pay for it. And where the company had been in the use of the land for their road, three or four years, it was held no such unreasonable delay, as to bar the relief sought. The party cannot excuse himself by showing, that from his own notions, or the representations of the company, or of third persons, he was induced to believe that a different route would have been adopted by the company, or that there was an inadequacy in the price stipulated, unless it be so gross, as to amount to presumptive evidence of fraud or mistake.[9]

8. But it is a good defence in such case, that the party was led into a mistake, without any gross laches on his part, by an uncertainty, or obscurity, in the descriptive part of the agreement, so that it applied to a different subject-matter, from that which he understood at the time, or that the bargain was hard, unequal, or oppressive, and would operate in a manner different from that which was in the contemplation of the parties, when it was executed. But in such case the burden of proof is upon the defendant, to show mistake or misrepresentation.[9]

9. Where the county commissioners made order in regard to the mode of construction of a railway, in crossing a highway, it was held, that the mayor and aldermen of a city, or the selectmen of a town, are the only proper parties to a bill for specific performance, and that the land-owners over which the railway passes, are not to be joined in the bill.[10] But where the order

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[9] Western Railway *v.* Babcock, 6 Met. 346; 1 Am. Railw. C. 365. The delivery of a deed to the agent of the corporation, in such case is sufficient. And where the party, in disregard of his contract, had obtained an assessment of damages for the land, under the statute, his liability upon the contract is, to the difference between the apprisal and the stipulated price in the contract.

Unreasonable delay is ordinarily a bar to specific performance in a court of equity. Guest *v.* Homfray, 5 Vesey, 818; Hertford *v.* Boore, Aston *v.* Same, 5 Vesey, 719; Watson *v.* Reid, 1 Russ. & My. 236; 2 Story's Eq. Jur. § 771, 777, and cases cited.

[10] Brainard *v.* Conn. River Railway, 7 Cush. 506. In Roxbury *v.* Boston & Prov. Railway, 6 Cush. 424, it was also held the commissioners must make such order specific, and not in the alternative, and that laches, in regard to such order,

required the highway * to be so raised, as to pass over the railway, at a place named, but without defining the height to which it should be raised, the grade, the nature of the structure, or the time within which it should be made, it was held too indefinite to justify a decree for specific performance.[11]

*CHAPTER XI.

EMINENT DOMAIN.

SECTION I.

GENERAL PRINCIPLES.

1. *Definition of the right.*
2. *Intercommunication.*
3. *Necessary attribute of sovereignty.*
4. *Antiquity of its recognition.*
5. *Limitations upon its exercise.*
6. *Resides principally in the states.*
7. *Duty of making compensation.*
8. *Navigable waters.*
9, 10, and 11. *Its exercise in rivers, above tide-water.*

§ 63. 1. This title is very little found in the English books, and scarcely in the English dictionaries. But with us, it has been adopted from the writers on national and civil law, upon the continent of Europe,[1] and is perhaps better understood than

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will not defeat the claim for a decree for specific performance, where public security is essentially concerned.

And courts of equity have held a parol license to erect public works, and the works erected in faith of it, irrevocable, and the company entitled to hold the land upon making compensation, and have virtually decreed specific performance. Water Power Co. *v.* Chamber, 1 Stockton, Ch. R. 471. See also Hall *v.* Chaffee, 13 Vt. R. 150; Boston & Maine Railway *v.* Bartlett, 3 Cush. R. 224. But it was held that an action for the price of land, will not lie upon a parol contract of sale, where there had been no conveyance of the land, although the company had taken possession and paid part of the price. Reynolds *v.* Dunkirk & State Line Railway, 17 Barb. 612. This is undoubtedly according to the generally recognized rule upon the subject, in those states where the Statute of Frauds is in force.

[11] City of Roxbury *v.* Boston & Providence Railway, 2 Gray, 460.

[1] Vattel, B. 1, ch. 20, § 244; Code Napoleon, B. 2, tit. 2, 545; 1 Black. Comm. 139; Gardner *v.* Newburgh, 2 Johns. Ch. 162; 2 Dallas, 310.

almost any other form of expression, for the same idea. It is defined to be that *dominium eminens*, or superior right, which of necessity resides in the sovereign power, in all governments, to apply private property to public use, in those great public emergencies, which can reasonably be met in no other way.

2. It is a distinct right from that of public domain, which is the land belonging to the sovereign. This is a superior right which the sovereign possesses in all property of the citizen or subject, whether real or personal, and whether the title were originally derived from the sovereign or not. One of the chief occasions for the exercise of this right is, in creating the necessary facilities for intercommunication, which in this country is now very generally known by the name of Internal Improvement. This extends to the construction of highways (of which turnpikes and railways are, in some respects, but different modes of construction and maintenance,) canals, ferries, wharves, basins, and some others.[2]

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[2] 3 Kent, Comm. 339 *et seq.* and notes; Beekman *v.* Saratoga & Sch. Railway, 3 Paige, 45, 73; 12 Pick. 467; 23 id. 327; 3 Selden, 314. This right, as some of the above cases show, extends to numerous matters not named in the text. It would be out of place here to enter into the discussion of the general subject. The indispensable prerequisites to the exercise of the right will appear, as far as they apply to the subject, in the following sections.

That railways are but improved highways, and are of such public use, as to justify the exercise of the right of eminent domain, by the sovereign, in their construction, is now almost universally conceded. Williamson *v.* N. Y. Central Railway, 18 Barb. 222, 246; State *v.* Rives, 5 Ired. 297; Northern Railway *v.* Concord & Claremont Railway, 7 Foster, 183; Bloodgood *v.* M. & H. Railway, 18 Wend. 9; s. c. 14 Wendell, 51; 1 Bald. C. C. Reports, 205. See also 3 Paige, 73; 3 Seld. 314.

It seems to be well settled, that the legislature have no power to take the property of the citizens for any but a public use; but that a railway is such use. Bradley *v.* N. Y. & N. H. Railway, 21 Conn. Rep. 294; Symonds *v.* The City of Cincinnati, 14 Ohio, 147; Embury *v.* Conner, 3 Comst. 511.

But this is a power essentially different from that of taxation, in regard to which there is no constitutional restriction, and no guaranty for its just exercise, except in the discretion of the legislature. The People *v.* Mayor of Brooklyn, 4 Comst. R. 419; Cincinnati, W. & Z. Railway *v.* Clinton Co. Comm. 1 Ohio St. R. 77.

The legislature must decide, in the first instance, when the right of eminent domain may be exercised, but this is subject to the revision of the courts, so far as the uses to which the property is applied, are concerned. 2 Kent, Comm. 340.

But, as to the particular instance, the decision of the legislature, and of the

*3. This is a right in the sovereignty, which seems indispensable to the maintenance of civil government, and which seems to be rather a necessary attribute of the sovereign power in a state, than any reserved right in the grant of property to the subject or citizen.

4. It seems to have been accurately defined, and distinctly recognized, in the Roman empire, in the days of Augustus, and his immediate successors, although from considerations of policy and personal influence and esteem, they did not always choose to exercise the right, to demolish the dwellings of the inhabitants, either in the construction of public roads or aqueducts, or ornamental columns, but to purchase the right of way.[3]

5. But in the states of Europe[1] and in the written constitution * of the United States, and in those of most of the American States, an express limitation of the exercise of the right makes it dependent upon compensation to the owner. But this provision in the United States constitution is intended only, as a limitation upon the exercise of that power, by the government of the United States.[4]

6. And it would seem, that notwithstanding this right of sovereignty may reside in the United States, as the paramount sovereign, so far as the territories are concerned, in reference to internal communication, by highways and railways, and notwithstanding the ownership of the soil of a portion of the lands, by the United States, in many of the states, as well as territories, still when any of the territories are admitted into the Union, as independent states, the general rights of eminent domain are vested exclusively in the state sovereignty.[5]

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commissioners appointed to exercise the power, is ordinarily final and not revisable in the courts of law. Varrick *v.* Smith, 5 Paige, 137; Armington *v.* Barnet, 15 Vt. R. 745.

And the legislature may restrain the owners of property, in its use, when in their opinion the public good requires it, without compensation, as this is not the exercise of the right of eminent domain. Commonwealth *v.* Tewksbury, 11 Met. 55; Coates *v.* Mayor of New York, 7 Cowen, 585. But see Clark *v.* Mayor of Syracuse, 13 Barb. 32.

The following case recognizes the general right stated in the text. Donnaher *v.* The State, 8 Sm. & M. 649.

3 Tacitus, Annals, Lib. I. § 75, *et seq;* Plin. Hist. Lib. 36, 2, *et seq.*

4 Barron *v.* Baltimore, 7 Peters, 243; Fox *v.* The State of Ohio, 5 How. 410, 434, 435.

5 Pollard *v.* Hagan, 3 How. 212; Goodtitle *v.* Kibbe, 9 How. 471; Doe *v.*

7. The duty to make compensation for property, taken for public use, is regarded, by the most enlightened jurists, as founded in the fundamental principles of natural right and justice, and as lying at the basis of all wise and just government, independent of all written constitutions, or positive law.[6]

8. But the public have a right, by the legislature, through the proper functionaries, to regulate the use of navigable waters, and the erection of a bridge, with or without a draw, by the authority of the legislature, is the regulation of a public right, and not the deprivation of a private right, which can be made the ground of an action, even where private loss is thereby produced, nor is it the taking of private property, for public use, which will entitle the owner to compensation.[7]

9. And where a ford-way was destroyed, by the erection of a dam across a river, in the construction of a canal, or other public work, under legislative grant, the river being a public highway, although *not strictly navigable, in the common-law sense, (which only included such rivers, as were affected by tide water,) it was held the owner of the ford-way could recover no compensation from the state, or their grantees, the act being but a reasonable exercise of the right to improve the navigation of the stream, as a public highway.[8]

10. Neither can the owner of a fishery, which sustains damage, or destruction, by the building of a dam, to improve the naviga-

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Beebe, 13 How. 25; United States *v.* Railway Bridge Co. 6 McLean, R. 517. In the Court of Claims recently, in the case of The Illinois Central Railway *v.* United States, 20 Law Rep. 630, it was held, that the abandonment of a military reserve, which had become useless for military purposes, causes it to fall back into the general mass of public lands, and that a state, by virtue of its right of eminent domain, may authorize the construction of railways through land owned but not occupied by the United States. And the United States being in possession of land owned by the plaintiffs, and which was necessary to carry out the objects of their charter, it was held, that a payment made by the plaintiffs, to obtain possession thereof, was made under duress, and might be recovered.

[6] *Spencer*, Ch. J., in Bradshaw *v.* Rogers, 20 Johns. 103; 2 Kent, Comm. 339, and note and cases cited, from the leading continental jurists.

[7] Davidson *v.* Boston & Maine Railway, 3 Cush. 91; Gould *v.* Hudson River Railway, 12 Barb. 616; s. c. 2 Selden, 522. Nor have the state any such right in flats, where the tide ebbs and flows, as to require a railway company to pay them damages, for the right of passage. Walker *v.* Boston & Maine Railway, 3 Cush. 1; 1 Am. Railw. C. 462.

[8] Zimmerman *v.* Union Canal Co. 1 Watts & S. 346.

tion of a river, above tide water, under grant from the state, sustain an action against the grantees.[9] So also in regard to the loss of the use of a spring, by deepening the channel of such a stream, by legislative grant.[10]

11. Nor is the owner of a dam erected by legislative grant upon a navigable river, and which was afterwards cut off, by a canal, granted by the same authority, entitled to recover damages.[11]

SECTION II.

TAKING LANDS IN INVITUM.

1. *Legislative grant requisite.*
2. *Compensation must be made.*
3. *Consequential damages.*
4. *Extent of such liability.*
5. *These grants strictly construed.*
6. *Limitation of the power to take lands.*
7. *Interference of courts of equity.*
8. *Rule of construction in American courts.*
9. *Strict, but reasonable construction.*
10. *Rights acquired by company.*
11. *Limited by the grant.*

§ 64. 1. In England railways can take lands by compulsion, only in conformity to the terms of their charters, and the general laws defining their powers.[1] And in this country a railway company or other corporation must show, not only the express warrant of the legislature,[2] (which it must for all its acts,) for taking *the lands of others, for their own uses, but also that the legislature, in giving such warrant, conformed to the constitutions of the states, in most of which it is expressly required, that compensation should be made for all lands taken. And upon this subject, the circumspection of the English courts, in requiring damage and loss, to the land-owners, to be fairly met, is shown

[9] Shrunk *v.* Schuylkill Navigation Co. 14 Serg. & Rawle, 71.

[10] Commonwealth *v.* Ritcher, 1 Penn. 467.

[11] Susquehannah Canal Co. *v.* Wright, 9 Watts & Serg. 9; Monongahela Navigation Co. *v.* Coons, 6 id. 101.

[1] Taylor *v.* Clemson, 3 Railw. C. 65. *Tindal*, Ch. J., here said, "This authority to take land, if exercised adversely, and not by consent, is undoubtedly an authority to be carried into effect, by means unknown to the common law." And in Barnard *v.* Wallis, 2 Railw. C. 177, the Master of the Rolls declares, that aside from the provisions of the act of parliament, the owner of one rod of land may insist upon his own terms, to the utter overthrow of the most important public work. "The price of his consent must be determined by himself."

[2] Hickok *v.* Plattsburgh, 15 Barb. 435; 4 Barb. 127; Halstead *v.* Mayor, &c., of New York, 3 Comst. 430; Hart *v.* Mayor of Albany, 9 Wend. 571, 588; 2 Denio, 110; Dunham *v.* Trustees of Rochester, 5 Cowen, 462.

very fully, by the language of Lord *Denman*, Ch. J., in The Queen *v.* The Eastern Counties Railway.[3]

2. "We think it not unfit to premise, that when such large powers are intrusted to a company, to carry their works into execution, without the consent of the owners and occupiers of the land, it is reasonable and just, that any injury to property which can be shown to arise from the prosecution of those works, should be fairly compensated for, to the party sustaining it."

3. In the English statute, too, railway companies are made liable to pay damage to the owner of all lands "injuriously affected" by any of their works. Such a provision does not exist, in many of the American states, and consequently no liability is imposed, for merely consequential damages to lands, no part of which is taken.[4]

4. Under the English statute giving damage where lands are "injuriously affected," railways have been held liable for all acts, which, if done without legislative grant, would constitute a nuisance, and by which a particular party incurs special damage.[5]

5. These grants being in derogation of common right are to receive a reasonably strict and guarded construction.[6] The Master of the Rolls, in this last case, says, "In these cases it is always to be borne in mind, that the acts of parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters—solicited, as they are, by individuals, for the purpose of private speculation and individual benefit." And in another case[7] the rule of construction is thus laid down:—

*6. "These powers extend no further than expressly stated in the act, except where they are necessarily and properly acquired for the purposes which the act has sanctioned." This last category, as here observed, is often a most perplexing one, in regard

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3 2 Railw. C. 736, 752.

4 Hatch *v.* Vermont Central Railway, 25 Vt. R. 49; Philadelphia & Trenton Railway, 6 Whart. 25; Monongahela Nav. Co. *v.* Coon, 6 Watts & Serg. 101.

5 Queen *v.* Eastern Co.'s Railway, 2 Q. B. 347; Glover *v.* North Staffordshire Railway, 5 Eng. L. & Eq. R. 335.

6 Gray *v.* Liverpool & Bury Railway, 4 Railw. C. 235–240.

7 Colman *v.* The Eastern Counties Railway, 4 Railw. C. 513, 524; State *v.* B. & O. Railway, 6 Gill, R. 363.

to its true extent and just limits. And doubtful grants are to be construed most favorably towards those who seek to defend their property from invasion.[8] And a railway, having an option between different routes, can only take lands on that route, which they ultimately adopt; and if they contract for land upon the other routes, cannot be compelled to take it.[9] The time for exercise of these compulsory powers, by the English statutes, is limited to three years,[10] except for improvements necessary for the public safety, in conformity with the certificate of the Board of Trade.

7. As a general rule in the English courts of equity, if the construction of a railway charter be doubtful, they will remit the party to a court of law to settle the right, in the mean time so exercising the power of granting temporary injunctions, as will best conduce to the preservation of the ultimate interests of all parties.[11]

8. Similar rules of construction have prevailed in the courts of this country. The language of Ch. J. *Taney*, in the leading case upon this subject, in the national tribunal of last resort, is very explicit. "It would present a singular spectacle, if while the courts of England are restraining within the strictest limits the spirit of monopoly and exclusive privilege in nature of monopoly, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication." [12] And in commenting upon the former decisions of that court, upon this subject, the same learned judge here says, "the principle is recognized, that in grants by the public nothing passes by implication." [13] And other cases are here referred to in the same court, in support of the same view.[14]

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[8] Sparrow *v.* Oxford, W. and W. Railway, 12 Eng. L. & Eq. R. 249; Shelford on Railways, 233.

[9] Tomlinson *v.* Man. & Birm. Railway, 2 Railw. C. 104; Webb *v.* Man. & Leeds Railway, 1 Railw. C. 576.

[10] Such a limitation is held obligatory wherever it exists. Peavey *v.* Calais Railway, 30 Maine R. 498; s. c. 1 Am. Railw. C. 147.

[11] Clarence Railway *v.* Great North of England, C. & H. J. Railway, 2 Railw. C. 763. But the practice of courts of equity in this respect, is by no means uniform. See *post*, chap. xxviii.

[12] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420.

[13] U. S. *v.* Arredondo, 6 Pet. 691, 738.

[14] Jackson *v.* Lamphire, 3 Pet. 280; Beaty *v.* Knowler, 4 Pet. 152, 168; Prov-

9. But it is not to be inferred that the courts in this country, or in England, intend to disregard the general scope and purpose of the grant, or reasonable implications, resulting from attending circumstances. But if doubts still remain, they are to be solved against the powers claimed.[15]

10. But where the right of the company to appropriate the land, is perfected under the statute, they may enter upon it, without any process for that purpose, and the resistance of the owner is unlawful, and he may be restrained by injunction, but that is unnecessary. The statute is a warrant to the company.[16]

11. But a grant to a railway to carry passengers and merchandise from A. to M., does not authorize them to transport merchandise from their depot in the city of M. about the city, or to other points, for the accommodation of customers.[17]

*SECTION III.

CONDITIONS PRECEDENT.

1. *Conditions precedent must be complied with.*
2. *That must be alleged in petition.*
3. *When title vests in company.*

§ 65. 1. It has been held, that a railway company must comply with all the conditions in its charter, or the general laws of

idence Bank *v.* Billings & Pittman, 4 Pet. 514. And that court not only adheres to the same view still, but may have carried it, in some instances, to the extreme of excluding all implied powers. See also upon this subject, Commonwealth *v.* Erie & Northeast Railway, 27 Penn. St. R. 339; and Bradley *v.* New York & New Haven Railway, 21 Conn. 294.

[15] Perrine *v.* Ches. & Del. Canal Co. 9 How. 172; Enfield Toll Bridge *v.* Hartford & N. H. Railway, 17 Conn. 454; Springfield *v.* Conn. River Railway, 4 Cush. 63; 30 Maine, 498; 9 Met. 553; 1 Zab. 442; 3 Zab. 510; 21 Penn. 9; 15 Ill. 20.

The following cases will be found to confirm the general views of the text. Tuckahoe Canal Co. *v.* Tuckahoe Railway, 11 Leigh, 42; Greenleaf's Cruise, vol. 2, 67, 68; Thompson *v.* N. Y. & H. Railway, 3 Sand. Ch. 625; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Moorhead *v.* Little Miami Railway, 17 Ohio, 340; Stormfeltz *v.* Manor Turnpike Co. 13 Penn. 555; Toledo Bank *v.* Bond, 1 Ohio St. R. 636; Cincinnati Coll. *v.* State, 17 Ohio, 110; Cam. & Amboy R. *v.* Briggs, 2 Zab. 623; Carr *v.* Georgia Railway & Banking Co. 1 Kelly, 524; 7 Ga. 221; New London *v.* Brainard, 22 Conn. 552; Bradley *v.* N. Y. & N. H. Railway, 21 Conn. 294; 9 Ga. 475; Barrett *v.* Stockton & D. Railway, 2 Mann. & Granger, 134.

[16] Niagara Falls & Lake Ontario Railway *v.* Hotchkiss, 16 Barb. 270.

[17] Macon *v.* Macon & Western Railway, 7 Ga. 221.

the state, requisite to enable it to go forward in its construction, before it acquires any right to take land by compulsion. In England one of these conditions, in the general law, is, that stock, to the amount of the estimated cost of the entire work, shall be subscribed. And where the charter or the general laws of the state gave the right to take land for the road-way, only upon the legislature having approved of the route and termini of the line, it was held the company could not proceed to condemn lands, for that purpose, until this approval was made.[1]

2. And where the act of the legislature, under which a railway was empowered to take lands, required the company to apply to the owner, and endeavor to agree with him, as to the compensation, unless the owner be absent or legally incapacitated, they have no right to petition for viewers, until that is done.[2] The petition should allege the fact, that they cannot agree with the owner.[2]

3. Where the charter of a railway company provides that the title of land condemned for the use of the company shall vest in the company, upon the payment of the amount of the valuation, no title vests until such payment.[3] In a late case,[4] the law upon *this subject is thus summed up: Where the charter of the company provides, that after the appraisal of land, for their use, "*upon the payment of the same*," or deposit, (as the case may be,) the company shall be deemed to be seized and possessed of all such lands, "they must pay or deposit the money before any

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[1] Gillinwater *v.* The Mississippi & A. Railway Co. 13 Ill. 1.

[2] Reitenbaugh *v.* Chester Valley Railway, 21 Penn. 100. But where the company have the right to lay their road, not exceeding six rods in width, and have fixed the centre line of the same, they may apply for the appointment of appraisers, and determine the width of the road, any time before the appraisal. Williams *v.* Hartford & New Haven Railway, 13 Conn. R. 110. But slight, if indeed any evidence of this failure to agree with the land-owner is required, where the claimant appears and makes no objection on that ground. Doughty *v.* Somerville & Easton Railway, 1 Zab. (N. Jersey) 442.

[3] Baltimore & Susquehannah Railway *v.* Nesbit, 10 How. (U. S.) R. 395. See also Compton *v.* Susquehannah Railway, 3 Bland, 391; Van Wickle *v.* Railway, 2 Green, 162; Stacy *v.* Vermont Central Railway, 27 Vt. R. 39; Levering *v.* Railway Co. 8 Watts & Serg. 459. And upon payment of the compensation assessed by commissioners, and taking possession afterward, the title of the company is perfected, as against the party to the proceedings. Bath River Navigation Co. *v.* Willis, 2 Railw. C. 7.

[4] Stacy *v.* Vermont Central Railway, 27 Vt. R. 39.

such right accrues." "The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction and without compliance with it, they may be enjoined by a court of equity, or prosecuted in trespass at law, for so doing. The right of the land-owner to the damages awarded is a correlative right, to that of the company to the land. If the company has no vested right to the land, the land-owner has none to the price to be paid."

SECTION IV.

PRELIMINARY SURVEYS.

1. *May be made without compensation.*
2. *Company not trespasser.*
3. *For what purposes company may enter upon lands.*
4. *Company liable for materials.*
5. *Right to take materials.*
6. *Location of survey.*

§ 66. 1. It is settled, that the legislature may authorize railway companies to enter upon lands for the purpose of preliminary surveys, without making compensation therefor, doing as little damage as possible, and selecting such season of the year as will do least damage to the growing crops. The proper rule to be observed, in this respect, being such, as a prudent owner of the land would be likely to adopt, in making such surveys for his own advantage.[1]

*2. In the English statute, and in many of the special charters, and general railway acts, in the American states, the company are bound to make compensation for such temporary use of the land, where they do not ultimately take the land. But in such case, where the statute authorizes the entry upon the land, the company are not to be treated as trespassers, and even where the statute provides for no compensation, it is not regarded as taking private property for public use, within the provisions of the American state, and United States constitutions.

3. Under the English statute, the notice to use lands for temporary purposes, should specify the particular purpose for which

[1] Cushman *v.* Smith, 34 Maine, 247; Polly *v.* S. & W. Railway Co. 9 Barb. R. 449; Bloodgood *v.* Mohawk & H. Railway Co. 14 Wend. R. 51; s. c. 18 Wend. 9; Miner *v.* McWilliams, Wright, 132. But in some states the party is made liable for damages for temporary occupation, by statute.

the lands are required.[2] By the English statute,[3] the company may make a temporary entry upon land for the following purposes:—

1st. For the purpose of taking earth, or soil, by side cuttings.

2d. For the purpose of depositing spoil.

3d. For the purpose of obtaining materials for the construction or repair of the railway.

4th. For the purpose of forming roads to, from, or by the side of the railway.[4]

3. By section 42, if the owner of such lands, as the company give notice of temporary occupation, elect to sell to the company and give them notice accordingly, they are compellable to buy, and in all other cases to make compensation for all injury to the same.

4. It has been held, in regard to the right of railway companies to take materials, from lands adjoining their survey, to build their road,[5] that the damages need not be appraised, till after the materials were taken: that the commissioners had authority to assess damages, for every act, which the company might lawfully do under their charter: that the company had the right to take such materials, *in invitum*, and to use other land, without their survey, for preparing stone for their use: that the same right equally resided in the contractors to build the road: and that the corporation is liable to the land-owner, for materials so taken, by the contractors, notwithstanding any stipulations in the contract of letting, exempting them from such liability, as between themselves and the contractors.

5. It has sometimes been made a question, in this country,

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2 Poynder *v.* The Great N. Railway Co. 5 Railw. C. 196.

3 8 & 9 Vict. ch. 20, § 32.

4 In Webb *v.* The Manchester & Leeds Railway Co. 1 Railw. C. 599, Lord *Cottenham*, Ch., is reported to have said: "The powers given to these companies are so large and frequently so injurious to the interests of individuals, that I think it is the duty of every court, to keep them most strictly within those powers, and if there is any reasonable doubt, as to the extent of their powers, they must go elsewhere and get enlarged powers, but they will get none from me, by way of construction of the act."

5 Vermont Central Railway *v.* Baxter, 22 Vt. R. 365. See also Bliss *v.* Hosmer, 15 Ohio, 44; Lyon *v.* Jerome, 15 Wendell, 569; Wheelock *v.* Young & Pratt, 4 Wendell, 647. Also Lesher *v.* The Wabash Nav. Co. 14 Illinois, 85. See *post*, § 68.

how far the legislature could confer upon railway companies, the power to take materials, without the limits of their survey, *in invitum*.[5]

6. But a railway company who enter upon land, to construct their road before the time for filing the location of their line, are liable as trespassers, if the location when filed, does not cover the land so entered upon.[6]

7. And the *onus* is upon the company to justify by showing that the land is covered by the authorized location.[6] The location filed by the company is conclusive evidence of the land taken, and cannot be controlled by extrinsic evidence, though a plan or map made a part of the description of the location, and filed with the written location, may be referred to for explanation, but not to modify or control the written location.[6]

SECTION V.

POWER TO TAKE TEMPORARY POSSESSION OF PUBLIC AND PRIVATE WAYS.

§ 67. 1. Under the English statute,[1] the company have the power, upon notice, to take temporary possession of private roads; and by other sections, they may take possession of, cut through, and interrupt public roads. But in all such cases the damage is to be compensated, and the road restored, when practicable, and if not, a substituted one made.

2. If a private way be obstructed, the remedy is to sue for *penalty under the statute, or to bring an action under the statute for special damage. But it is said an action upon the case for the obstruction, cannot be maintained, except in the case of special damage, which is expressly saved by the statute.[2]

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[6] Hazen *v.* The Boston & Maine Railway, 2 Gray, 574; Stone *v.* Cambridge, 6 Cush. 270; 3 N. H. 10; Lewiston *v.* County Commissioners, 30 Maine, 19; Little *v.* Newport, A. & H. Railway, 14 Eng. L. & Eq. R. 309; Springfield *v.* Conn. River Railway, 4 Cush. 69, 70.

[1] 8 & 9 Vict. c. 20, § 30.

[2] Watkins *v.* Great Northern Railway Co. 6 Eng. L. & Eq. R. 179.

SECTION VI.

LAND FOR ORDINARY AND EXTRAORDINARY USES.

1. *By English statute may take land for all necessary uses.*
2. *Companies have the same power here.*
3. *So also of companies connecting at state lines.*

§ 68. 1. By the English statutes, railway companies may not only purchase land for the purpose of the track, but also for all such extraordinary uses, as will conduce to the successful prosecution of their business.[1] This includes the site of stations, yards, wharves, places for the accommodation of passengers, and the deposit of freight, both live and dead, and for the erection of weighing machines, toll-houses, offices, warehouses, and other buildings, and conveniences; land for ways to the railway while in the course of construction, and to stations always.

2. The same may undoubtedly be done, in this country, whether any express provision to that effect is contained in the charter of the company, or the general statutes of the state, or not; such power being necessarily implied, as indispensable to the * accomplishment of the general purposes of the corporation, and the design of the legislative grant.

3. And this same implied power is to be extended to a railway corporation, in a neighboring state, with which, by express statute, railways of the state where the lands lie, have the right to

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[1] 8 & 9 Vict. ch. 20, § 45. This section is only operative to enable the company to take lands for extraordinary purposes, beyond the line of deviation, by consent of the owners. But it is held that the justices have no jurisdiction, under the Railway Clauses Consolidation Act, to determine when accommodation works are necessary, but only what works are necessary, assuming that some such works are to be made. Reg. *v.* Waterford & L. Railway, 2 Irish Law R. (N. S.) 580. See *post*, Appendix B, § 99.

In the case of Chicago, Burlington, & Quincy Railway *v.* Wilson, 17 Ill. R. 123, it was held, that a grant to a railway company, to construct a road, with such appendages, as may be deemed necessary, for the convenient use of the same, will authorize them to take land, compulsorily, for workshops. And this power is not exhausted by the apparent completion of the road, but if an increase of business shall require other appendages, or more room for tracks, it may, in like manner, be taken, *toties quoties*. But the land-owner may traverse the right of the company to take the land, and have it determined by the proper tribunal. S. Carolina Railway *v.* Blake, 9 Rich. 228.

unite at the line of the state.[2] And for the purpose of exercising the rights conferred by their act upon the company, the contractor for the execution of railway works must be deemed an agent of the company.[3]

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[2] State *v.* Boston, Concord & Montreal Railway Co. 25 Vt. R. 433. In this case a railway company in New Hampshire had constructed their road to the line of Vermont, (where by statute of the legislature of Vermont, two other roads were chartered, with permission to unite with any New Hampshire road,) and had there purchased some fifteen acres of land, adjoining the terminus of their road, which is of course the "westernmost" bank of Connecticut River, their bridge being all in New Hampshire except the western abutment, which of necessity must rest upon Vermont soil. The company had no express grant from the legislature of Vermont. A controversy arising between this New Hampshire road, and the Vermont roads at this point, in regard to the terms of junction, a *quo warranto* was prosecuted on behalf of the state, to determine the right of the New Hampshire railway to purchase, and hold lands, in the state of Vermont.

It was attempted to maintain on the part of the prosecution, that there existed a right in any state, to confiscate or escheat, lands held by a foreign corporation. But the court repudiated the proposition, and held that the New Hampshire road, by the grant from the Vermont legislature of the right of the Vermont roads to form a junction with this road, at the line of the state, had acquired the implied permission to purchase and hold, so much land as was necessary for the accommodation of their present and prospective business at that point, whether any junction had yet been arranged at the point or not; and that fifteen acres was not an unreasonable extent of land for such purposes, there being no question but the New Hampshire railway had, by its charter, the right to hold real estate, for the necessary purposes of its incorporation, to an amount beyond what it had yet purchased.

The court in this case did not hold, that the New Hampshire road had any right to take land by compulsory proceedings in Vermont, or that their purchase of the land would deter the Vermont roads, at this point, from taking, by statutory compulsion from them, such portions of the same land as they might require for their own purposes. See also Nashville Railway *v.* Cowardin, 11 Humph. 348. In the Supreme Court of New Hampshire, 20 Law Rep. 646, Crosby *v.* Hanover, it was held that the franchise of a toll-bridge across Connecticut River, might be taken for a free highway, upon compensation being made to the proprietors; and that it made no difference, that one of the abutments of the bridge was within the limits of the state of Vermont, and consequently could not be taken by any proceedings in New Hampshire.

[3] Semple *v.* The London & Birmingham Railway, 1 Railw. C. 480; Vt. Central Railway *v.* Baxter, 22 Vt. R. 365; *ante*, § 66; Lesher *v.* Wabash Nav. Co. 14 Ill. R. 85.

*SECTION VII.

TITLE ACQUIRED BY COMPANY.

1. *Company have only right of way.*
2. *Can take nothing from soil except for construction.*
3. *Deed in fee-simple to company.*
4. *For what uses may take land.*
5. *Right to cross railway, extent of.*
6. *Conflicting rights in different companies.*
7. 8. *Rule in the American states.*
9. *Right to use streets of a city.*
10. *Law not the same in all the states.*
11. *Rule in Massachusetts.*
12. 13. *Land reverts to the owner.*
14. *True rule stated.*
15. *Conditions must be performed.*
16. *Further assurance of title.*
17. *Condemnation cannot be impeached.*

§ 69. 1. Questions have sometimes arisen, in regard to the precise title, acquired by a railway company, in lands purchased by them, where the conveyance is a fee-simple. It is certain, in this country, upon principle, that a railway company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes. And it is very questionable whether a railway, in such case, is entitled to the herbage growing upon the land, or to cultivate the same, or to dig for stone, or minerals, in the land, beyond what is necessary for their purposes in construction.

2. In England, the statutes[1] give all such minerals to the former owner of the land, except such as are necessary in construction, unless the same shall have been expressly purchased. And in this country, no doubt, the same construction would be adopted, in regard to all lands taken by compulsory proceeding.[2]

3. But it admits of some question, we think, what is the precise effect of a deed, in fee-simple, to a railway company. It would seem, upon general principles, that the grantor should be estopped from claiming any interest in the land, after the execution of his deed. But it seems to be agreed, in all the books, that, to the efficacy of a deed of land, it is requisite that the

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[1] 8 and 9 Vict. c. 20, § 17.

[2] Baker *v.* Johnson, 2 Hill (N. Y.) R. 342. It was held here, that a contractor to build a canal, who stipulated with the commissioners to find all the materials necessary to the performance of the work, with stipulations in the contract that he might use all the earth obtained by excavation, might also use the stone obtained by excavating the bed of the canal across plaintiff's land, and that trover will not lie for such use.

grantee be capable of taking the estate. And if the grantee be an alien, or a corporation * incapable of holding such estate, the deed is inoperative. Hence, in some of the cases, it seems to be a just inference from the reasoning of the court, that a railway, by a deed in fee-simple, acquires only a right of way,[3] that being all which such corporation is capable of taking.

4. It has been held in some of the states, that the lands of a railway company are subject to sale upon execution against them, or may be assigned by them.[4] So, too, they may purchase and hold land for the procurement of materials, or for the economical construction of the road.[5] In a late English case,[6] it was held that the railway could not use land, thus conveyed, for any other purpose than that expressed in the acts of parliament, by virtue of which the company exercised their functions.

5. It has been held that, where one railway has power in their act to cross another railway, there being no express permission in the act for one company to take land, or for the other company to sell, that the first company could not be compelled, by mandamus, to purchase any of the land upon which the other road was constructed, their only claim being one for damages.[7] So, also, the right to make a junction with a preëxisting railway, does not imply the power to take the title to any of the lands of such railway, unless that is indispensable to effect the junction, but only to enter upon such lands, by way of easement, for the purpose of effecting the junction.[8]

6. But where the legislature confer the power upon two railway companies to purchase compulsorily the same piece of land, and one company has taken the land and constructed their road upon it, equity will enjoin the other company from proceeding

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[3] Dean *v.* Sullivan Railway, 2 Foster, 316; United States *v.* Harris, 1 Sumner, 21. It is held in some cases, that a grant to a railway, before its incorporation is valid, not being the conveyance of a fee, and to its operation and effect, not requiring the existence of a grantee, at the time of the conveyance. Rathbone *v.* Tioga Navigation Co. 2 Watts & Serg. 79.

[4] Arthur *v.* Commercial & Railroad Bank, 9 Smedes & Marshall, 394.

[5] Overmyer *v.* Williams, 15 Ohio, 26.

[6] Bostock *v.* The North Staffordshire Railway [February, 1856, before Vice-Chancellor *Stuart*, 19 Law Rep. 106.]

[7] Reg. *v.* South Wales Railway, 6 Railw. C. 489.

[8] Oxford, Worcester & Wolverhampton Railway *v.* South Staffordshire Railway, 19 Eng. L. & Eq. R. 131.

to take it *compulsorily for their use, until the conflicting rights of the companies are determined, by a trial, at law.[9]

7. The general course of decisions in this country, coincides with the English common-law rule, in regard to the title acquired by the public, by the exercise of the right of eminent domain, that is, that no more of the title is divested from the former owner, than what is necessary for the public use.[10] The owner may still maintain trespass, for any injury to the freehold, by a stranger.[10]

8. And in regard to railways, in particular, it has been repeatedly decided in the different states, that they take only an easement in land condemned for their use.[11] In an important case[12] in the Supreme Court of the United States, involving questions of title in regard to the streets in the city of Pittsburgh, Mr. Justice *McLean* thus sums up the general doctrine:—

"By the common law, the fee in the soil remains in the original owner where a public road is established over it; but the use of the road is in the public. The owner parts with this use only; for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as a high-

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[9] Manchester, S. & L. Railway *v.* The Great N. Railway, 12 Eng. L. & Eq. R. 216.

[10] Dovaston *v.* Payne, 2 H. Bl. 527; Rust *v.* Low, 6 Mass. R. 90; Jackson *v.* Rutland & Burlington Railway, 25 Vt. R. 151; 2 Rolle's Ab. 566, p. 1.

[11] Railroad *v.* Davis, 2 Dev. & Bat. 457; Dean *v.* Sullivan Railway, 2 Foster, 316; Plank Road *v.* Buff. & P. Railway, 20 Barb. 644; Weston *v.* Foster, 7 Met. 297. In a late case in Ohio, where the subject seems to have been examined with care and study, it is laid down, as the result of the law upon the subject, that only such interest as will answer the public wants, can be taken; and it can be held only so long as it is used by the public, and cannot be diverted to any other purpose. Giesy *v.* Cincinnati, Wil. & Zanesv. Railway, 4 Ohio St. R. 308. See also Hooker *v.* Utica & Minden Turnp. Co. 12 Wend. 371; People *v.* White, 11 Barb. 26; Blake *v.* Rich, 34 N. H. R. 282. The title of the land-owner is thus defined in this last case. The exclusive right of property in the land, in the trees and herbage upon its surface, and in the minerals below it, remains unchanged, subject always to the right of the company to construct and operate their road, in any legally authorized mode.

[12] Barclay *v.* Howell's Lessee, 6 Pet. R. 498. Cases to establish the general principle here announced, might be multiplied to any extent. They will be found extensively collected in 3 Kent's Comm. 532 and notes. By the civil law, it is said, the soil of public highways is in the public, and the law of Louisiana is the same. Renthorp *v.* Bang, 4 Martin's R. 97.

way, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it. He may bring an action of trespass against any one who obstructs the road."

9. But a query is expressed here, as in many other cases, whether this rule applies to the streets and thoroughfares of cities. In a late case in one of the British Provinces on this continent, Nova * Scotia, it is said to have been held, by a divided court, after long debate and deliberation, that the title to land, covered by a highway, or street, vested absolutely in the crown, and that the owner had no reversionary interest.[13]

10. Some of the American cases seem to intimate a different rule from that which generally prevails in regard to highways, in regard to the title acquired by railway companies.[14]

11. But in a late case in Massachusetts,[15] the title seems to us to be explicitly and fully stated, and the only ground of distinction between railways and common highways, as to the title of the land taken, very intelligibly pointed out. The court here say, "The right acquired by the corporation, although technically an

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13 Koch *v.* Dauphin, James, 159.

14 Wheeler *v.* Rochester & Syra. Railway, 12 Barb. 227; Munger *v.* Tonawanda Railway, 4 Comst. 349; Coster *v.* New Jersey Railway, 3 Zab. 227. The New York Court of Appeals, quite recently, upon elaborate examination, came to the conclusion, that a deed to a railway company granting land to it and its successors, conveys an estate in fee. Nicoll *v.* New York & Erie Railway, 2 Kernan, 121. But see Henry *v.* Dubuque & Pacific Railway, 2 Clarke (Iowa) R. 288.

15 Hazen *v.* B. & M. Railway, 2 Gray, 574. But the company have no right to do any act upon the land except what is conducive to the use of the land for the purposes of their grant, of which they are the judge. Brainerd *v.* Clapp, 10 Cush. 6. In this case, *Shaw*, Ch. J., thus defines the title of the railway, in lands taken for their use: "The railway are authorized to do all acts, within the five rods, which by law constitute their limits, in taking away or leaving gravel, trees, stones, and other objects, which in their judgment may be necessary and proper to the grading and levelling of the road, in adjusting and adapting it to other roads, bridges, buildings, and the like, so as to render it most conducive to the public uses which the railway is intended to accomplish. Whatever acts therefore are requisite to the safety of passengers on the railway, to the agents, servants, and persons employed by the company, and to the safe passage of travellers, on and across highways and roads connected with it, and which can be done within the limits of the five rods, the company have a right under their act of incorporation to do. This is embraced in the idea of taking land for public use." Chicago & Miss. Railway *v.* Patchin, 16 Ill. 198.

easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive."

12. Hence, it seems to be admitted that, even in cases where the statute provides for the taking of the fee, upon the discontinuance of the public use, the land reverts to the former owner.[16] But where a special act authorizes a municipal corporation to hold the * fee of the soil for the site of an almshouse, it was held that the original owner and his representatives could claim no exclusive interest therein, or any reversionary title thereto, after the removal of the almshouse to another site.[17]

13. In some of the cases in this country, it has been held, that it is only the residuum of title remaining in the corporation, at the time a railway is discontinued, that reverts to the former owner of the land, and that, in the mean time, the company may wholly defeat the reversion, by a conveyance in fee-simple; and this remarkable proposition is distinctly announced in one case,[18]—" Corporations have a fee-simple for purposes of alienation, but they have only a determinable fee, for purposes of enjoyment."

14. If it were said that corporations, created for special purposes of intercommunication, like railways and canals, and invested with the sovereign prerogative of eminent domain for these purposes only, had no interest, or estate, in lands whatever, except for the mere purpose of carrying on the functions, with which they were invested by the state, and could neither use nor convey the lands, to be used for any other purpose whatever, it would seem far more in accordance with established principles and generally received notions upon the subject. In the same case it is said, a grant to a corporation, created only for a term of years, purporting to convey a fee, will not be construed to convey only a term for years.

15. In all these cases where the title of the company depends

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16 People *v.* White, 11 Barb. 26; United States *v.* Harris, 1 Sumner, 21. And by the repeal of a charter, the lands do not revert to the former owner, but the franchises of the corporation are resumed by the state, and the railway remains public property, subject to the management and control of the state. Erie & Northeast Railway *v.* Casey, 26 Penn. R. 287. But see Rexford *v.* Knight, *infra.*

17 Hayward *v.* Mayor of New York, 3 Seld. 314. So also in regard to lands appropriated to the use of the state canals. Rexford *v.* Knight, 1 Kernan, 308.

18 Nicol *v.* N. York & Erie Railway, 12 Barbour, 460. See State *v.* Rives, 5 Ired. 297.

upon conditions, they must be strictly performed and strictly construed.[19]

16. But where, by the law of the state, railways, upon discovery that the title they are acquiring may prove defective, have the right to take new proceedings, it was held, that the discovery of a mortgage upon lands will justify the abandonment of pending process, and instituting procedure under the section which allows them to extinguish incumbrances, on that portion required for their road.[21] And the appraisal of land subject to an easement in the grantor, is irregular, and no title passes.[21]

*17. After land is condemned for the use of a railway, the adjudication can no more be impeached by any collateral proceeding, or by evidence, than the judgment of any other court of exclusive jurisdiction.[22]

And it was held, under the Pennsylvania statute,[23] that after the award of land damages, and payment of the money, the company become the owners of the land, notwithstanding the pendency of a *certiorari* to remove the case into the Supreme Court.[24]

SECTION VIII.

CORPORATE FRANCHISES CONDEMNED.

1. *Road franchise may be taken.*
2. *Compensation must be made.*
3. *Railway franchise may be taken.*
4. *Rule defined.*
5. *Constitutional restrictions.*
6. *Not well defined.*
7. *Must be exclusive, in terms.*
8. *Legislative discretion.*
9. *Highways and railways compared.*
10. *Extent of eminent domain.*
11. *Exclusiveness of the grant, a subordinate franchise.*
12. *Legislature cannot create a franchise, above the reach of eminent domain.*

§ 70. 1. The franchise of a turnpike, or bridge, or other similar corporation, may be taken for a free road, or for a railway, which, as we have said, is an improved highway.[1]

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[19] Bangor & Piscataqua Railway *v.* Harris, 8 Shepley, R. 533; Lovering *v.* Railway, 8 Watts & Serg. 459; Munger *v.* Tonawanda Railway, 4 Comst. 349; Carr *v.* Georgia Railway & Banking Co. 1 Kelly, 524.

[20] New York Central Railway, 20 Barbour, 419.

[21] Hill *v.* Mohawk & H. Railway, 3 Seld. 152.

[22] Hamilton *v.* Annapolis & Elk Ridge Railway, 1 Md. Ch. 107.

[23] Stat. of 1829, § 15.

[24] Schuler *v.* Northern L. Railway, 3 Whar. 555; *ante*, § 65, *post*, § 73.

[1] Armington *v.* Barnet, 15 Vt. R. 745; West River Bridge *v.* Dix, 6 How. S.

2. But compensation, either for the entire franchise, which is the more common course, and ordinarily the only just mode of procedure, or for the special injury, must be made.[2] But it is no objection, to the validity of an act of the legislature, allowing a railway to carry its track across the land of a mill-dam company, incorporated by the legislature, that it contains no express provision for compensation to such mill-dam company. This is *implied, as in other cases, where land is taken.[3] And the same implication has been held to extend to the case of a subsequent grant of a railway, which materially depreciated the use and value of a prior grant of a bridge.[4] But it is the more commonly received opinion, that a subsequent grant, which only incidentally operates injuriously to an earlier one, does not require compensation to be made for such injury, unless expressly so provided.[5]

3. So also may the franchise of one railway be taken, for the construction of another railway.[6]

4. In a late case the law upon this subject is thus stated, by *Shaw*, Ch. J.: "The court are of opinion, that it is competent for the legislature, under the right of eminent domain, to grant authority to a railway corporation, to take a highway longitudinally in the construction of their road. The power of eminent domain is a high prerogative of sovereignty, founded upon public exigency, according to the maxim, *Salus reipublicæ lex suprema est*, to which all minor considerations must yield, and which can only be limited by such exigency. The grant of land for one public use must yield to that of another more urgent."[7]

C. R. 507; s. c. 16 Vt. R. 446; White River Turnpike Co. *v.* Vermont Central Railway, 21 Vt. R. 594; Boston Water Power Co. *v.* Boston & Worcester Railway, 23 Pick. R. 360; Central Bridge Corporation *v.* City of Lowell, 4 Gray, 474.

2 West River Bridge *v.* Dix, *supra;* Boston Water Power Co. *v.* Boston & Worcester Railway, *supra.* But see 11 Leigh, 42.

3 Boston Water Power Co. *v.* Boston & Worcester Railway, *supra.*

4 Enfield Toll Bridge Co. *v.* The Hartford & New H. Railway, 17 Conn. R. 454; s. c. 17 Conn. R. 40.

5 White River Turnpike Co. *v.* Vermont Central Railway, 21 Vt. R. 594.

6 *Grier*, J., in Richmond Railway *v.* Louisa Railway, 13 How. 81, 82; Newcastle Railway *v.* P. & J. Railway, 3 Ired. 464.

7 Springfield *v.* Conn. River Railway, 4 Cush. 63. See also upon the general subject, Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio Railway, 4 Gill & Johns. 1; Forward *v.* Hampshire & Hampden Canal Co. 22 Pick. R. 462, where

5. The great question of the inviolability of corporate franchises, which we shall have occasion to discuss more at large hereafter,[8] is, no doubt, to a certain extent, involved here. For, upon general principles of legislative authority, there could be no question that a corporation, which is the mere creature of the legislature, might be, at once, and unconditionally, extinguished, by repeal of the charter. This is confessedly within the power of the legislative authority of the British parliament; and the legislative authority of the parliament of Great Britain, is no more extensive than that of the *legislatures of the American states, aside from restrictions contained in the constitutions of the United States, and of the several states.[9]

6. The only limitation upon this power over private corporations, in most of the states, perhaps in all, is found in that provision of the United States constitution, which prohibits the legislatures of the several states from passing any law impairing the obligation of contracts. And the proper limits of this restriction, in regard to corporations, is not altogether well defined, in the different opinions of the several judges of the supreme national tribunal, upon this subject; nor is there any thing approaching unanimity among them.

7. But it may perhaps be regarded as settled, for the time at least, that where exclusive privileges are conferred upon private corporations, by express words, or necessary implication, the grant is irrevocable and inviolable. But that the grant of any privilege, or franchise, carries no implied exclusion, of similar privileges and franchises being conferred upon other persons, natural or corporate.[10]

8. The legislature may in all instances determine, when and where the public necessities require additional facilities, of a similar or analogous character, where the former grant is not exclusive.[10]

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the prior company is held bound by acquiescence in the transfer of its franchises to another company. Irvine *v.* Turnpike Co. 2 Penn. 466; Rogers *v.* Bradshaw, 20 Johns. R. 735; Backus *v.* Lebanon, 11 N. H. 19.

[8] *Post*, § 231.

[9] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[10] Charles River Bridge *v.* Warren Bridge, 11 Pet. R. 420; Thorpe *v.* Rut. & Bur. Railway, 27 Vt. R. 140; Boston & Lowell Railway *v.* Salem & Lowell Railway, 2 Gray, 1; Mohawk Bridge Co. *v.* Utica & Sch. Railway, 6 Paige, R. 554; Hudson & Delaware Canal Co. *v.* New York & Erie Railway, 9 Paige, R. 323.

9. And in some cases of exclusive and perpetual grants, for common highways or bridges, it has been held, that this did not preclude the legislature from granting railways, and railway bridges, within the limits of the former grant.[11] In the last case referred to, the court held, that a perpetual grant of a toll-bridge, across the Cape Fear River, which in terms, subjected all persons to a penalty, for transporting persons, or property, across that river, in any other manner, within six miles of the plaintiff's bridge, would not subject the defendants' company to the penalty, for carrying persons and property across the river, upon their road, by means of a bridge erected within the six miles; that the grant was intended to be exclusive only, as to all modes of travel and * transportation, then known, but not to exclude all improvements thereon, in all future time.[12]

10. But the exclusive character of a corporate grant, will not preclude the power to take the franchise, upon making compensation, under the right of eminent domain, the stipulation in the charter, that the grant shall be exclusive of all others, being subject to the same law of other property, whether in possession, or action, all which is confessedly subject to the exercise of the right of eminent domain, by the sovereign.[13]

11. It has sometimes been characterized, as a refinement, or an evasion, to identify the covenant, in the charter of a private corporation, that the grant shall be exclusive of all others, with the charter itself, and thus subject it to the law of eminent domain. But it seems to us, entirely a sound view, in all cases, where the whole franchise of the corporation is proposed to be taken, and that the charge of refinement is rather to be laid at the door of such as attempt to raise a distinction, between the exclusiveness of the grant, and the grant itself, in order to preserve the inviolability of the former, which is the lesser and subordinate franchise, when the latter, and paramount, and vital fran-

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[11] McRee *v.* Wilmington & Raleigh Railway, 2 Jones, Law R. 186. But see Enfield Bridge Co. *v.* Hartford & New H. Railway, 17 Conn. R. 40, 454.

[12] But this distinction is certainly not attempted to be maintained, in the majority of the cases upon this subject, either in England or in this country. *Post*, § 231 *et seq.*

[13] Enfield Toll Bridge Co. *v.* Hartford & New Haven Railway, 17 Conn. R. 40 and 454.

chise of a corporation, is confessedly subject to the law of eminent domain.[14]

12. It is intimated in West River Bridge Company *v.* Dix, by *Woodbury*, J., that if the charter of the corporation contained an express stipulation, against the exercise of the right of eminent domain upon the corporation, this might secure the franchise. But this is certainly not the prevailing opinion.[15]

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[14] West River Bridge Co. *v.* Dix, 16 Vt. R. 446; 6 Howard, U. S. R. 639. Opinion of *Woodbury*, J.. "It is certainly difficult to comprehend, why the *exclusiveness* of the grant to a private corporation, should, upon principle, be any more inviolable, by legislative authority, than any other part of the corporate franchise. It is only as property that it is valuable, or that it is protected, at all. And all property is, in cases of proper necessity, subject to the law of eminent domain. It is very questionable, whether this law should be held to extend to those portions of public works which may always be obtained in the market, and where, by consequence, there is no practical necessity."

[15] In regard to the right of eminent domain, it seems now to be conceded, that no legislature, upon any consideration or pretence whatever, can deprive a future legislature of its exercise, in the absolute annihilation of corporate franchises, upon just and adequate compensation. In Backus *v.* Lebanon, 11 N. Hamp. 19, *Parker*, Ch. J., says: "Had the charter contained an express stipulation, that the property of the corporation should never be taken, in the exercise of the power of eminent domain, the question would at once have arisen, whether it was competent for any legislature to make a contract of that character; whether any legislature has authority, by contract, to lay restrictions upon this power." And reference is here made to Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. Hamp. 69, as containing the views of the court upon the subject. See also Brewster *v.* Hough, 10 N. Hamp. 138; Northern Railway *v.* Concord & Claremont Railway, 7 Foster, 183, 195.

The remarks of the late Professor Greenleaf, in his edition of Cruise, vol. 2, tit. 27, § 29, in note, p. 67, 68, upon this important subject, seem altogether worthy of commendation, and their insertion here will require no apology. "But in regard to the position, that the grant of the franchise of a ferry, bridge, turnpike, or railroad, is in its nature exclusive; so that the state cannot interfere with it by the creation of another similar franchise, tending materially to impair its value; it is with great deference submitted, that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenues for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses, and the like; and those powers which are not thus essential, such as the power to alienate the lands and other property of the state, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist; and necessity requires that they

*SECTION IX.

COMPENSATION. MODE OF ESTIMATING.

1. *General inquiry simple.*
2. *Remote damage and benefits not to be considered.*
3. *General rule of estimating compensation.*
4. *Prospective damages assessed.*
5. *In some states value, "in money," is required.*
6. 7. *Damage and benefits cannot be considered in such cases.*
8. *Rule of the English statute.*
9. *Farm accommodations.*
10. *Benefits and damage, if required, must be stated.*

Note 10. *Course of the trial, in estimating land damages.*

§ 71. 1. The inquiry in regard to what compensation shall be made, for land taken for public works, would, on the face of it,

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should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature, disabling itself from the future exercise of powers intrusted to it for the public good, must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant, that it will not under any circumstances open another avenue for the public travel within certain limits, or a certain term of time; such covenant being an alienation of sovereign powers and a violation of public duty.

"But if, in order to provide suitable public ways, the state has availed itself of private capital, and secured its reimbursement by the grant of a charter of incorporation, with the right to take tolls for a limited period; and the public necessity should afterwards require the creation of another way, the opening of which would diminish the profits of the first, and so prevent the corporators from receiving the compensation intended to be secured to them; the state, thus sacrificing the private property of the corporation for public uses, would unquestionably be bound, as a sacred moral duty, to make full indemnity therefor in some other mode.

"All those grants of franchises, therefore, which are in derogation of the essential attributes of sovereignty above mentioned, are to be construed strictly; and nothing is to be taken by implication. It was on this ground that the case of the Warren Bridge was decided. The legislature had granted a charter for the building of the Charles River Bridge, with the right of receiving tolls, and upwards of forty years afterwards, the public exigency requiring another and free avenue between the same places, an act was passed authorizing the erection of the Warren Bridge, a few rods from the former, the opening of which, as a natural consequence, reduced the tolls of the former to a very small amount. And this act was held to be not unconstitutional. Charles River Bridge *v.* Warren Bridge, 11 Peters, R. 420, cited, and its reasoning affirmed, in Butler *v.* Pennsylvania, 10 How. (S. C.) Rep. 402 (1850); Woodfolk *v.* Nashville, &c. Railway Co. 1 Am.

* seem to be a very simple one. One would naturally suppose the value of the land taken or the damage sustained, to be the fair * measure of compensation, and that there could be no serious difficulty in ascertaining the amount.

2. But in consequence of numerous ingenious speculations in regard to possible advantages, and disadvantages, arising from the public works, for which lands are taken, the whole subject has become, in this country especially, involved in more or less uncertainty. All the cases seem to concur in excluding mere general and public benefit, in which the owner of land shares, in common with the rest of the inhabitants of the vicinity, from being taken into consideration in estimating compensation.

3. It has been said, the appraisers are not to go into conjectural and speculative estimations of consequential damages,[1]

L. Reg. 520. [See also Matter of Hamilton Avenue, 14 Barb. Sup. Ct. 405; Illinois and Michigan Canal *v.* Chicago and R. I. Railway Co. 14 Ill. 314; Rundle *v.* The Delaware & R. Canal Co. 14 How. (U. S.) 80; 13 ib. 71; 10 ib. 511, 541; Shorter *v.* Smith, 9 Ga. 517.]

"The learned chancellor *Kent*, in a note appended to the case of 11 Pet. R. 420, deeply regrets that decision, concurring in the opinion of Mr. Justice *Story*, who dissented from it. But against the weight of the opinion of this great judge, may be placed that of the late Chief Justice *Marshall*, the writer having been informed, as a fact within the personal knowledge of the informant, that the chief justice held the charter of Warren Bridge constitutional, upon the first argument of the cause; and that it was on account of this division of the bench that a second argument was ordered, which he did not live to hear. And it is worthy of notice, in this connection, that Mr. Justice *Story*, in delivering his dissenting opinion in the same term, in the case of Briscoe *v.* The Bank of the Commonwealth of Kentucky, 11 Pet. R. 328, supports it by referring to a similar opinion held by the late chief justice, upon the former argument of that cause; while in the case of Warren Bridge no such support is invoked; doubtless for the reason that it could not be had.

"The state being bound in good faith, as already stated, to make full and complete indemnity to individuals, whose private rights, in the exercise of its eminent domain, it has been obliged to sacrifice for the general good, the question is reduced to the mode of compensation; whether actual payment of the damages must precede or accompany the act of the state; or whether the individual ought to have at least a compulsory remedy at law; or whether the pledge of public faith is a sufficient security. On this subject various opinions are held. See 2 Kent, Comm. 338–440, and note (c) on p. 339, 5th ed.; 11 Pet. R. 471, 472, 642, 643; The People *v.* White, 4 Law Rep. (N. S.) 177." See also, to the same effect, the opinion of Mr. Justice *Grier*, of the United States Circuit Court, in Milnor *v.* The New J. Railw. 6 Law Reg. 6, 7; and Croshy *v.* Hanover, 20 Law Rep. 646.

[1] Meacham *v.* Fitchburg Railway, 4 Cush. R. 291; Upton *v.* South Reading

but confine themselves to estimating the value of the land taken, to the owner. This is most readily and fairly ascertained, by determining the value of the whole land, without the railway, and of the portion remaining, after the railway is built. The difference is the true compensation to which the party is entitled.[2]

*4. But the appraisers are to assess all the damages, present and prospective, to which the party will ever be entitled, by the prudent construction and operation of the road.[3]

5. Some of the state constitutions, in terms, provide, that compensation for private property, taken for public use, shall be made "in money," and many eminent jurists have strenuously maintained that compensation, to the extent of the value of the land taken, must always be made in money, and that no deduc-

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Branch Railway Co. 8 Cush. R. 600; Albany N. Railway Co. *v.* Lansing, 16 Barb. 68; Canandaigua & N. Railway *v.* Payne, 16 Barb. R. 273; Greenville & C. Railway Co. *v.* Partlow, 5 Rich. 528; White *v.* Charlottesville & S. C. Railway Co. 6 Rich. 47; A. & S. Railway Co. *v.* Carpenter, 14 Illinois, 190; Symonds *v.* The City of Cincinnati, 14 Ohio R. 147; Brown *v.* Cincinnati, id. 541; McIntire *v.* State, 5 Blackford, 384; State *v.* Digby, 5 Blackf. 543; James River & Kanhawa Co. *v.* Turner, 9 Leigh, 313; Schuylkill Co. *v.* Thoburn, 7 Serg. & R. 411. A jury may take into the account in estimating damages, the effect the construction of the railway will have in diminishing deposits of sediment, which had been made by a river, in high water flowing upon the land and greatly enriching it. Concord Railway *v.* Greely, 3 Foster, 237. And the deterioration of the adjacent parts of the same land, (but which is not taken,) either for agriculture, or sale for building lots; by risk from fire, care of family and stock, inconvenience caused by embankments, excavations, and obstructions to the free use of buildings, is to be taken into the account, in estimating damages. Somerville & E. Railway *v.* Doughty, 2 Zab. 495. The increase or decrease in the price of the remaining land, and the expense of fencing, are to be taken into the account, in assessing compensation. Greenville & Columbia Railway *v.* Partlow, 5 Rich. 428.

2 Troy & Boston Railway *v.* Lee, 13 Barb. 171; Matter of F. Street, 17 Wend. 649; Canal Co. *v.* Archer, 9 Gill & J. 480; Parks *v.* City of Boston, 15 Pick. 198; Somerville Railway *v.* Doughty, 2 Zab. 495. But no account is to be taken, in estimating land damages, of the benefit the railway may have been to other property of the plaintiff, disconnected with that taken. Railway *v.* Gilson, 8 Watts, 243; see Columbus, P. & J. Railway *v.* Simpson, 4 Law Reg. 696; Rochester & Sy. Railway *v.* Budlong, 6 How. Pr. R. 467; Sater *v.* B. & Mt. Pl. Railway, 1 Clarke, 386. The value of the land, at the time of trial, or at any time subsequent to the construction of the work, cannot be referred to in determining the benefits conferred upon that portion of the land not taken. Ind. Central R. *v.* Hunter, 8 Ind. R. 74.

3 Dearborn *v.* Boston, Concord & Montreal Railway Co. 4 Foster, R. 179. Clark *v.* Vt. & Canada Railway, 28 Vt. R. 103.

tion can be made, on account of any advantage, which is likely to accrue to other property of the owner, by reason of the public work, for which the property is taken.[4]

6. In a late case in Vermont the court held, that taking land for a public highway, is not appropriating it to public use, within the meaning of the constitution of that state, which requires compensation in such cases, to be made "in money," but that this provision only applies, where the fee of the land is taken; and that where an easement only is taken for the purpose of a highway, and the remaining land is worth more than the whole was, before the laying out of the road, the party is entitled to no compensation.[5]

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[4] 2 Kent, Comm. 7th ed. 394 and note; Jacob *v.* The City of Louisville, 9 Dana, R. 114; The People *v.* The Mayor of Brooklyn, 6 Barb. S. C. R. 209. But this last case was subsequently reversed in the Court of Appeals. 4 Comst. 419; Rice *v.* Turnpike Co. 7 Dana, 81; Woodfolk *v.* N. & C. Railway, 2 Swan, 422. In this case, it was said benefits to the remaining land may be set off against injury, but the party cannot be compelled to apply such benefits towards the price of his land. Railway *v.* Legard, 10 Louis. Ann. R. 150. Under such a provision in the constitution of Ohio, it was held, that in assessing damages, the jury had no right to take into consideration the fact, that the value of the land had been increased by the proposal, or construction of the work. Giesy *v.* Cin. Wil. & Zanesv. Railway, 4 Ohio St. R. 308. General benefits resulting from the erection of a railway, to all who own property in the vicinity, are not to be taken into the account, in estimating land damages; and it was doubted if special benefits, accruing to the remainder of the land, could be so taken into account. Little Miami Railway *v.* Collett, 6 Ohio State R. 182.

[5] Livermore *v.* Jamaica, 23 Vt. R. 361. This case has been questioned. 1 Bennett's Shelford on Railways, 441. See also Reitenbaugh *v.* Chester Valley Railway, 21 Penn. 100. *Contra*, McMahon *v.* Cincinnati Railway, 5 Ind. 413; 3 id. 543. Benefits arising to the owner of the land "by the construction of the road," held not to have reference to the whole work, but to that particular portion which runs through the party's land. Milwaukie & Mis. R. *v.* Elbe, 4 Chand. R. 72. An act which provides for setting off the advantages to other land against the value of the land taken, is not, on that account, unconstitutional. McMasters *v.* Commonwealth, 3 Watts, 296. But it has very often been held, that such accidental advantages, especially where they are not peculiar to the particular land-owner, cannot be set off against the specific value of the land taken. State *v.* Miller, 3 Zab. 383; Woodfolk *v.* Nash. & Ch. Railway, 2 Swan, 422; Hill *v.* M. & H. Railway, 5 Denio, 206; Keasy *v.* Louisville, 4 Dana, 154; Sutton *v.* Louisville, 5 Dana, 28; People *v.* Mayor of B. 6 Barb. 209. But many cases hold the contrary. People *v.* Mayor of Brooklyn, 4 Comst. 419, where s. c. 6 Barb. 209, is reversed; Rexford *v.* Knight, 15 Barb. 627. But where profits are to be taken into the account, the title to have them considered obtains, at the

*7. This is, certainly, not in conformity with the general course of decision upon this subject. It is the only case, probably, where an attempt is made to escape from such a constitutional provision, in this manner. Some will doubtless regard it as too refined, to be sound. And if it is true, as is sometimes claimed, that the legislature had no right to resume the fee of land for highways and railways, such a constitutional provision, with such a construction, would have little application to the taking of land for such uses.[6]

8. The English statute provides, that in estimating compensation for land damages "regard shall be had not only to the land taken, but also to damage, by reason of severance from other lands, or otherwise injuriously affecting such lands." There are, too, in the English statute, provisions for compensation to sundry subordinate interests in lands, as to lessees for years, and to tenants from year to year. And also in regard to mines. The company are not entitled to mines, or minerals, under lands, except such parts as shall be necessary to use in the construction of the road, unless expressly purchased. It has been held that stone got from quarries are * minerals,[7] and that mines are quarries, or places where any thing is dug.[8] By the English statute, the company may remove or displace gas or water pipes, making compensation to all parties injured.

9. And where commissioners appraise the damages upon the basis of the railway making and maintaining certain works, for

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time the servitude is located. Palmer Co. *v.* Ferrill, 17 Pick. 58. Benefits by increase of business and population, markets, schools, stores, and other like improvements, cannot be considered, in estimating damages, for flowing land, by a mill-dam. Ib.

In a recent case in New Hampshire, not yet reported, in the Reports of that state, Petition of White Mountains Road Company, Law Rep. April, 1857, it was decided, that in assessing damages for land taken for a turnpike, or free highway, compensation is to be given for the actual value of the land taken, without regard to any speculative advantages or disadvantages to the owner, from the making of the highway. See Cushman *v.* Smith, 34 Maine R. 247. But in Indiana Central Railw. *v.* Hunter, 8 Ind. R. 74, the same rule is adopted, as in the case first cited in this note.

6 Hatch *v.* Vermont Central Railway Co. 25 Vt. R. 49; Reitenbaugh *v.* Chester Valley Railway, 21 Penn. 100. *Contra*, Little Miami Railway *v.* Naylor, 2 Ohio, 235.

7 Micklethwait *v.* Winter, 5 Eng. L. & Eq. R. 526.

8 Hodges on Railways, 238, note (*y*).

the accommodation of the land-owner, as a culvert and waste-way, etc., it was held this portion of the award was not void, but if acquiesced in, by the company, and the land taken, and compensation made upon that basis, they thereby become bound by its provisions.[9]

10. In some of the states in this country, the advantages and disadvantages of taking land for a railway are required to be stated in the report of appraisal, and the omission to make such specific statement was held a fatal omission.[10] So too, where

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9 Morse, Petitioner, 18 Pick. R. 443.

10 Ohio & Pennsylvania Railway *v.* Wallace, 14 Penn. 245; Reitenbaugh *v.* Chester Valley Railway, 21 Penn. 100; 8 Watts, 243; 25 Penn. 396. But it has been held, in some cases, where the advantages resulting to the land-owner were to be taken into the account, that the value of the land need not be stated separately from the damage, in an award of arbitrators, but only the amount of the whole injury. At all events, such amendments will be allowed, as to cure such defects. Greenville & Columbia Railway *v.* Nunamaker, 4 Rich. 107.

Questions have sometimes been made, in regard to which party in proceedings of this character is entitled to go forward, in the proofs and argument. Upon principle and in analogy to similar proceedings upon other subjects, we think there can be little doubt this right is with the land-owner, in the proceedings before the jury and the commissioners or arbitrators, where he is to all intents actor. But after having obtained an award, it has been more usual, in practice, to allow the excepting party to go forward. 1 Greenleaf's Ev. § 76, 77; Connecticut River Railway *v.* Clapp, 1 Cush. 559; 1 Am. Railw. C. 450; Mercer *v.* Whall, 5 Q. B. 447.

But see Albany N. Railway Co. *v.* Lansing, 16 Barb. 68, where the court say, "The commissioners have the right and power to exercise their own discretion in reference to the order they take in appraising the land. They may view the land first and hear the proofs and allegations afterwards or *vice versâ*. So whether one party or the other should first be heard, is for them to determine. Having decided that the railway corporation might open and close the hearing, the defendant was concluded by their decision, as also would their decision have been conclusive on the company, had the same privilege been awarded to the owner of the land." But where the error in the exercise of this discretion does manifest wrong, at Nisi Prius, the verdict will be set aside for this reason alone in the full bench. 1 Greenleaf's Ev. 104 and note, § 76.

But awards of land damages have been set aside for excessive damages. Somerville & Easton Railway *v.* Doughty, 2 Zab. 495. But this subject was somewhat considered in Troy & Boston Railway *v.* Lee, 13 Barb. 169; Same *v.* Northern Turnpike Co. 16 Barb. 100; and it was held that such award should not be set aside, unless it appeared that the commissioners erred in the principles by which their judgment should be guided or were clearly mistaken in the application of correct principles. This is putting them much upon the same ground, as awards in other cases. And in Walker *v.* Boston & Maine Railway, 3 Cush. 1, it was

additional *expense of fencing is allowed in improved land, the report must specify that fact.[11]

SECTION X.

MODE OF PROCEDURE.

1. *Legislature may prescribe.*
2. *Must be upon proper notice.*
3. *Formal exceptions waived, by appearance.*
4. *Unless exception is upon record.*
5. *Proper porties, those in interest.*
6. *Title may be examined.*
7. *Plaintiffs must show joint interest.*
8. *Jury may find facts and refer title to the court.*
9. *Land must be described in verdict.*
10. *Distinct finding on each claim.*
11. *Different interests.*
12. *What evidence competent.*
13. *Proof of value of land.*
14. *Opinion of witnesses.*
15. *Testimony of experts.*
16. *Matters incapable of description.*
17. *Costs.*
18. *Expenses.*
19. *Commissioners' fees.*
20. *Appellant failing must pay costs.*
21. *Competency of jurors.*
22. *Power of court to revise proceedings.*
23. *Debt will not lie on conditional report.*
24. *Excessive damages ground of setting aside verdict.*

Note. *Other matters of practice.*

§ 72. 1. It seems to be universally admitted, that where the organic law of the state does not prescribe the mode of procedure, in estimating land damages, for the use of a railway company, or other public work, it is competent for the legislature to prescribe *the mode, and that the mode, so prescribed, must be strictly followed.[1]

2. Thus, it has been held, that notice in writing to the owner of the land to be taken, its situation and quantity, must be given.[2]

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held, that the common pleas, to whom the verdict of a sheriff's jury is to be returned, and who may set the same aside, for any good cause, were justified in doing so, for irregularity in impanelling the jury; or in the conduct of the jury; or in the instructions given the jury, by the sheriff; or for facts affecting the purity, honesty, or impartiality of the verdict; such as tampering with the jury or other misconduct of the party; or any irregularity or misconduct of the jurors. But in a court of error the verdict can only be set aside for error appearing of record. But see § 72, *post;* Nicholson *v.* New York & New Haven Railway, 22 Conn. R. 74.

11 New Jersey Railway *v.* Suydam, 2 Harrison, 25.

1 Bonaparte *v.* C. & A. Railway, Bald. C. C. R. 205; Bloodgood *v.* M. & H. Railway, 14 Wend. 51; 18 id. 9; s. c. 2 Am. Railw. C. 415.

2 Vail *v.* Morris & Essex Railway, 1 Zab. 189. But the notice to appoint commissioners need not describe the land, it is held in other cases. Doughty *v.* Somerville & Easton Railway, id. 442.

But the form of the notice, or whether signed by the company, or by the commissioners, is not important.[3] And it is requisite, not only that proper notice should be given, but that it should appear upon the face of the proceedings, that the particular notice required, by the statute, was given.[4] But in general, we apprehend, if it appears upon the proceedings, that notice was given to the land-owner, it might, upon general principles, be presumed it was the notice required.

3. But merely formal exceptions, to the mode of procedure, and the competency of the triers, in such cases, must be taken, at the earliest opportunity, where there is an appearance, or they will be regarded as waived.[5]

4. And after appeal, it should appear, by the record, that merely formal exceptions were made, in the proceedings below, and overruled, or they cannot be revised.[5] So too where the party excepting to proceedings before commissioners, applies for a jury, to revise the assessment of damages, it will be regarded, as a waiver of the exceptions.[5] He should have applied for a *certiorari*, if he intended to revise the case, upon his exceptions.[5]

5. In regard to the proper parties to such proceedings, almost infinite variety of questions will arise. The only general rule, which can be laid down perhaps, is, that those having an interest in the question, may become parties plaintiff, or be made parties defendant, according to the character and quality of the interest.[6]

*6. In the English courts, it has been held, that these summary tribunals, for estimating land damages, are not to inquire into the title of the claimants.[7] But in some cases, in this country,

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[3] Ross *v.* Elizabethtown & Somerville Railway, 1 Spencer, R. 230.

[4] Van Wickle *v.* Railway Co. 2 Green, 162. See also Bennett *v.* Railway, id. 145.

[5] Fitchburg Railway *v.* Boston & Maine Railway, 3 Cush. R. 58; s. c. 1 Am. Railw. C. 508; Walker *v.* Boston & Maine Railway, 3 Cush. 1; Pittsfield & North Adams Railway *v.* Foster, 1 Cush. 480; Field *v.* Vermont & Massachusetts Railway, 4 Cush. 150; 13 Met. 449, 479; Meacham *v.* Fitchburg Railway, 4 Cush. 291; Davis *v.* Charles River Branch Railway, 11 Cush. 506.

[6] Fitchburg Railway *v.* Boston & Maine Railway, 3 Cush. 58; Ashby *v.* Eastern Railway, 5 Met. 368; Greenwood *v.* Wilton Railway, 3 Foster, 261; Parker *v.* Boston & Maine Railway, 3 Cush. 107; Mason *v.* Railway, 31 Me. R. 215.

[7] *Post*, Appendix B, § 98.

it has been held, that the claimant's title to the land, is a proper subject of inquiry, before the jury, in estimating damages.[8] And where the commissioners refuse to allow the petitioner damages, on account of his not being the owner of the land, this is such a final decision, as may be revised by a jury, and the Supreme Court will allow a mandamus, if that is denied.[9]

7. Parties, who join, must show a joint interest in the land, but this need not always be shown by deed. Oral evidence is sometimes admissible, where one owns the fee, and others have a joint interest, in consequence of erections, and the jury may properly pass upon the title, as matter of fact.[10]

8. But the jury are not bound to decide upon conflicting titles, but may report the facts, without determining the owner.[11] And it has been held that the jury are not bound to find a special verdict, in regard to the title of the claimant, or where there are conflicting claims, but may do so, with propriety.[12]

9. The jury should describe the land with intelligible boundaries.[13]

*10. Where the claim for damages consists of several items, it is more conducive to a final disposition of the case, to state the

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[8] Directors, &c. *v.* Railway, 7 Watts & Serg. 236.

[9] Carpenter *v.* County Commissioners of Bristol, 21 Pick. 258. The trustee and not the *cestui que trust* is the proper party to such proceeding. Davis *v.* Charles River Branch Railway, 11 Cush. 506.

[10] Ashby *v.* Eastern Railway, 5 Met. 368.

[11] Matter of Anthony Street, 19 Wend. 678. So too where one owns the fee, and another has a bond for a deed, the condition of which is not yet performed, they may join. Proprietors of Locks and Canals *v.* Nashua & Lowell Railway, 10 Cush. R. 385.

[12] Davidson *v.* Boston & Maine Railway, 3 Cush. 91; 1 Am. Railway C. 534. The sheriff is bound to give the jury definite instructions, in regard to the effect of a conveyance. Id.

[13] Vail *v.* Morris & Essex Railway, 1 Zab. 189. But see Philadelphia Railroad *v.* Trimble, 4 Whart. 47. The jury are not to include in their estimate the expense of farm accommodations, which it is the duty of the railway to furnish. Id. But if this be done, and the party have judgment on the verdict, he is bound to make the erections. Curtis *v.* Vermont Central Railway, 23 Vt. R. 613. One tenant in common cannot proceed in his own name, to have the damages done, by a railway, to the common land, assessed, even where he has authority from his co-tenant to do so. Railway *v.* Bucher, 7 Watts, 33.

But if the petition be signed by the lessee and the agent of the owner of mines, this is a sufficient representation of the interest. Harvey *v.* Lloyd, 3 Barr, 331. See also Shoenberger *v.* Mulhollan, 8 Barr, 134.

finding, upon each item. In such case any objectionable item may be remitted, or deducted, without the necessity of a rehearing.[14]

11. But where the petition alleges several distinct causes of damage, and a general verdict is rendered, if one, or more, of the causes is insufficient, it will not be presumed the jury gave any damages, on such insufficient claims, in the absence of any instructions by the sheriff, in relation to them.[15] But it is not necessary to apportion the damages to several joint-owners, and a tenant for life may take proceedings to obtain damages done to his estate, by the construction of a railway, without joining the remainder-man.[16]

12. The character of the proof admitted to enable the triers to learn the value of land is so various, that it is not easy to fix any undeviating rule upon the subject. It seems to have been the intention of the courts to allow only strictly legal evidence to be received, such as would be admissible, in the trial of similar questions, before a jury, in ordinary cases.[17]

13. It has been allowed to show, what price the company had paid, by voluntary purchase, for land adjoining, but in the same case it was held not competent, to inquire of adjoining land owners, who were farmers, and had occasionally bought and sold land, what was the value of their own land adjoining.[18] Nor is it competent to show, for what price one had contracted to buy land adjoining.[19] Nor can the claimant prove, what the company have offered him for the land;[20] nor what the company have been *compelled to pay for land adjoining, which was taken compulsorily.[21]

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14 Fitchburg Railway *v.* Boston & Maine Railway, 3 Cush. 58; s. c. 1 Am. Railw. C. 508.

15 Parker *v.* Boston & Maine Railway, 3 Cush. 107.

16 Railroad *v.* Boyer, 13 Penn. R. 497; Directors of Poor *v.* Railway, 7 Watts & Serg. 236; Pittsburgh & Steuben Railway *v.* Hall, 25 Penn. R. 336. In one case it was said to be the duty of the commissioners to assess damages, to joint owners, jointly. Ross *v.* Elizabethtown & Somerville Railway, 1 Spencer, 230.

17 Troy & Boston Railway *v.* Northern Turnpike Co. 16 Barb. 100; Lincoln *v.* Saratoga & Schenectady Railway, 23 Wend. 432. *Nelson*, Ch. J., Rochester & Syracuse Railway *v.* Budlong, 6 How. Pr. R. 467.

18 Wyman *v.* Lexington & West Cambridge Railway, 13 Met. 316.

19 Chapin *v.* Boston & Providence Railway, 6 Cush. 422.

20 Upton *v.* South Reading Railway, 8 Cush. R. 600.

21 White *v.* Fitchburg Railway, 4 Cush. 440.

14. And it has been held that witnesses cannot be allowed to give their opinion, of the value of the land, or materials taken.[22] This inquiry leads to the discussion of the general question, of what matters may be proved, by the opinion of witnesses, who are not possessed of any peculiar knowledge, skill, or experience, upon the subject.

15. And it must be admitted the cases are not altogether reconcilable, upon the subject. Experts are admitted to express their opinions, not only upon their own observation, but upon testimony given in court, by other witnesses, and where the testimony is conflicting, upon a hypothetical state of facts.[23] The testimony of such witnesses is intended to serve a double purpose, that of instruction to the jury upon the general question involved, and elucidation of the particular question to be considered by them.[23]

16. But there are certainly a very considerable number of subjects, in regard to which the jury are supposed to be well instructed, and altogether capable of forming correct opinions, and in regard to which the testimony of experts is not competent, but which it is more or less difficult for the witnesses to describe accurately, so as to place them fully before the minds of the jury, as they exist in the minds of the witnesses. Among these are inquiries in regard to the extent of one's property, solvency, health, affection, or antipathy, character, sanity, and some others. In such cases the witnesses' knowledge is chiefly matter of opinion, and it is impossible to enumerate each particular fact. Of this character seem to us to be questions in regard to the quality and value of property. One may enumerate some of the leading facts, upon which such an opinion is based, but after all, the

[22] Montgomery & West Point Railway *v.* Varner, 19 Ala. R. 185; Concord Railway *v.* Greely, 3 Foster, 237.

[23] 1 Greenleaf Ev. § 440. Thus the testimony of persons employed in making insurance of buildings against fire, may, in actions against railways for consequential damages to buildings, by the near approach of the track, express their opinion of the effect thereby produced upon the rent, or the rate of insurance of such buildings. Weber *v.* Eastern Railway, 2 Met. 147. See also Henry *v.* Dubuque & Pacific Railway, 2 Clarke, R. 288. And in the case of Brown *v.* Providence, Warren, & Bristol Railway, 5 Gray, it was held, that the company could not show that liquors were sold, or to be sold, upon land, as a part of the inducement to pay so high a rent, or that it was "*contemplated*" having a station near the point; such testimony being too indefinite and remote.

testimony, as to facts, is excessively meagre, without the opinion of the witness, either upon the very subject of inquiry, or some one as near it as can be supposed. Hence in those courts, where the opinion of witnesses, in regard to the value of property, real or personal, is not admitted, it leads to sundry shifts, and evasions, in the course of the examination of witnesses, upon that subject, which, while it is not a little embarrassing in itself, at the same time illustrates the inconsistency, not to say absurdity, of the rule.[24]

17. In regard to costs, in such proceedings, the more general

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[24] Opinion of the court in Concord Railway *v.* Greely, 3 Fost. 237. "A witness may state what was the cost of property of a particular description at a given place, in order to ascertain the value of property of a similar description. Whipple *v.* Walpole, 10 N. H. R. 130. But evidence of the price for which the corporation offered to sell a tract adjoining Greeley's, and how much they refused to take for it, is certainly of doubtful competency. We have held at this term, in the case of Hersey *v.* The Merrimack County Mutual Fire Insurance Company, in Merrimack county, that what the owner of a piece of real estate said he would sell the same for, was competent evidence against him, as tending to show its value. But that was a statement in regard to the value of the land itself, while the evidence admitted here was going one step further; it was a statement in regard to other lands; and it is quite questionable whether it could have any legitimate tendency to prove the value of Greeley's land.

"On questions of science, skill, or trade, or others of a like kind, experts may not only testify to facts, but are permitted to state their opinions. 1 Greenl. Ev. § 440. But on subjects of general knowledge, which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the jury must form their opinions. In such cases, the testimony of witnesses, as experts merely, is not admissible."

If an inquiry arose in regard to the value of a cargo of flour, it would certainly sound strange, to hear witnesses testify what precisely similar flour is worth, and at the same time be gravely told, that they were studiously to avoid expressing any opinion of the value of this very flour, which they had seen and examined, and in regard to which, the whole testimony was received. Yet such is, from necessity, the course resorted to, under the rule. The more general course is, we think, to receive the opinion of witnesses, acquainted with the property, and the state of the market, as to the value of the particular property in question. White *v.* Concord Railway, 10 Foster, 188. But in New Hampshire, in a late case, it is held that the opinion of witnesses, in regard to apparent health, is competent to be given; and this seems to be yielding the main point of exclusion before insisted upon. Spear *v.* Richardson, 34 N. H. R. 428. In this same case the opinion of witnesses, whether a horse was sound, or had a particular disease, the heaves, was excluded because the witness was not shown to be an expert. We are not surprised that the judge regarded the distinction as "somewhat nice." See also Roch. & Sy. Railway *v.* Budlong, 6 How. Pr. R. 467.

rule is, not to allow them, unless specifically given by statute.[25] But where the statute provides for an assessment of land damages, by a jury, at the suit of the party aggrieved, the costs to be paid *by the company, this was held not to include the fees of witnesses examined by the jury, on the part of the claimant.[26]

18. But the terms "costs and expenses incurred," were held to include the costs of witnesses, and of summoning the viewers.[27]

19. If the act makes no provision for compensation to the commissioners, they have no power to order the company to pay the cost of their expenses and services.[28]

20. But where the party whose costs are rightfully denied in the Court of Common Pleas, appeals upon that question, and the judgment is affirmed, he must pay costs to the other party, consequent upon the appeal.[29]

21. It is no objection to the competency of a juror, in this class of cases, that he had been an appraiser of damages, upon another railway, in the same county, or that he is a stockholder in another railway, which had long before acquired the lands, necessary for its use.[30]

22. Courts do not generally possess the power to revise the assessment of land damages, by a jury or other tribunal, appointed by them for that purpose, upon its merits, and set it aside, upon the mere ground of inadequacy, or excess of damages.[31]

23. Where commissioners assessed land damages at a sum named, and stated further, that the plaintiff was to receive an

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25 Herbein *v.* The Railroad, 9 Watts, 272.

26 Railroad *v.* Johnson, 2 Wharton, 275.

27 Penn. Railroad *v.* Keiffer, 22 Penn. R. 356.

28 At. & St. L. Railroad *v.* The Commissioners, 28 Maine R. 112.

29 Harvard Branch Railway *v.* Rand, 8 Cush. R. 218; Commonwealth *v.* Boston & Maine Railway, 3 Cush. R. 56. But see § 71, note 10, *ante*, in regard to the course of proceeding, in estimating land damages. Where the statute gives an appeal, in estimating land damages, to a court of common-law jurisdiction, and does not prescribe the mode of trying the appeal, it will be tried by commissioners, that being the usual course of trying cases of that class, in common-law courts. And, a statute requiring parties to be allowed a trial by jury, in all cases proper for a jury, will not alter the mode of trying such appeals. Gold *v.* Vt. Central Railway, 19 Vt. R. 478.

30 People *v.* First Judge of Columbia, 2 Hill, (N. Y.) R. 398.

31 Willing *v.* Baltimore Railway, 5 Whart. 460. As to what is good cause for setting aside the report of commissioners, see Bennett *v.* Railway, 2 Green, R. 145; Van Wickle *v.* Same, id. 162; 6 How. Pr. R. 467.

additional sum, in a certain contingency, and the report became matter of record, it was held that debt will not lie, for the additional sum, upon averring the happening of the contingency.[32]

*24. Where the statute gave the court a discretion, to accept and confirm the inquest of land damages, or order a new inquest, "if justice shall seem to require it," it was held they might set aside the report for mere excess of damages, and that the Supreme Court might do the same, when the proceedings are brought up by *certiorari*.[33]

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[32] W. & P. Railroad Co. *v.* Washington, 1 Robinson, (Va.) R. 67. See also Dimic *v.* Brooks, 21 Vt. R. 569.

[33] Pennsylvania Railway *v.* Heister, 8 Barr, 445; Same *v.* McClure, id.; Same *v.* Riley, id.; Same cases, 2 Am. Railw. C. 337.

OTHER MATTERS OF PRACTICE, IN REGARD TO ASSESSING LAND DAMAGES.

All the commissioners must be present and act, in all matters of a judicial character. Crocker *v.* Crane, 21 Wend. 211. In regard to the mode of selecting and impanelling juries, for assessing land damages against railways, the following cases may be referred to,—Penn. Railway *v.* Heister, 8 Barr, 445, which decides, that where the statute requires the sheriff to summon the jury, it is irregular for him to select them, from a list prepared by his deputy. And Vail *v.* Morris & Essex Railway, 1 New J. 189, where it is held, that commissioners appointed to value the land of E. W. upon one route, adopted by the company, cannot appraise the land of the same person, when the company adopt a different route, across the land.

In regard to the right of appeal, which is given in terms to the party aggrieved, it has been held to extend to the railway company, as well as the land-owner. Kimball *v.* Kennebec & Portland Railway, 35 Maine R. 255.

No appeal lies from the order of the Supreme Court confirming the report of commissioners on the appraisal of land damages, for land taken under the general railway act. The act provides for no such appeal to the Court of Appeals, and the remedy, in the act, is intended to be exclusive. And besides, the Supreme Court exercise a discretion, to some extent, in confirming such reports, and appeals will not, upon general principles, lie to revise such adjudications. New York Central Railway *v.* Marvin, 1 Kernan, 276; Troy & Boston Railway *v.* Northern Turnpike Co. 16 Barb. 100.

Where the special act of a railway company required them to give the land-owner ten days' notice of the time when a jury would be drawn to assess damages, it was held that a strict compliance with this requirement was indispensable to give jurisdiction, and that the objection was not waived by appearance, before the officer at the time the jury were drawn, and objecting to the regularity of the proceedings, without stating the grounds, or by appearing before the jury, when

*SECTION XI.

WHEN COMPENSATION MUST BE MADE.

1. *Opinions conflicting.*
2. *Chancellor Kent's definition.*
3. *That of the Code Napoleon.*
4. *Most state constitutions require it, to be concurrent with the taking.*
5. *English cases do not require this.*
6. *Adequate legal remedy sufficient.*
7. *Where required, payment is requisite to vest the title.*
8. *Some states hold that no compensation is requisite.*

§ 73. 1. In general, railway acts require compensation to be made, before the company take permanent possession of the land.[1] And it has even been made a question, in this country, whether the legislature could give a railway company authority to take permanent possession of lands, required for their use, previous to making or tendering or depositing, in conformity with their charter or the general law, compensation for the same.[2]

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they met to appraise the damages, and objecting to one of them, who was set aside. Cruger *v.* The Hudson River Railway, 2 Kernan, 190.

Mere informalities in the summons, which do not mislead the company, will not avoid the proceeding. Eastham *v.* Blackburn Railway, 25 Eng. L. & Eq. R. 498.

It is not important that the award should specify the finding upon the separate items of claim. *In re* Bradshaw, 12 Q. B. 562.

Where the special act of a railway company prescribes a different mode of procedure, in condemning land, from that required by a general law of the state, subsequently passed, the company may pursue the course prescribed by their special act. Clarkson *v.* Hudson River Railway, 2 Kernan, 304. But it seems to be here considered, that the company may adopt the course prescribed, by the general act, if they so elect. And upon general principles, it would seem, that they should do so, unless there is something in the general act, by which the existing railways, are at liberty to proceed under their charters. This is the ground of the decision in the last case.

Where the company's special act vests specific and special powers in them, for the benefit of the public, (as to build stations of given dimensions, larger than the general act provides,) it is not controlled by subsequent general acts. London & Blackwall Railway *v.* Board of Works, 28 Law Times, 140, December, 1856.

In regard to the mode of proceeding in such cases, see Coster *v.* New J. Railway & Tr. Co. 4 Zab. 730; Green *v.* Morris & Essex Railway, id. 486; Pittsfield & North Adams Railway *v.* Foster, 1 Cush. 480.

1 Lands Clauses Consolidation Act, 8 Vict. c. 18, § 84, *et seq.;* Ramsden *v.* Manchester & S. J. & A. Railway, 5 Railw. C. 552. In such cases courts of equity will enjoin the company from taking possession until compensation is made, unless the owner consent. Ross *v.* E. T. & S. Railway, 1 Green's Ch. 422.

2 Thompson *v.* Grand Gulf Railway Co. 3 Howard, Miss. R. 240. The consti-

2. The profound and sensible author of the Commentaries on American Law,[3] thus states the rule, upon this subject: "The *settled and fundamental doctrine is, that government has no right, to take private property, for public purposes, without giving just compensation; and it seems to be necessarily implied, that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently, in point of time, with the actual exercise of the right of eminent domain."

3. The language of the Code Napoleon[4] is specific upon this point: "No one can be compelled to give up his property except for the public good, and for a just and previous indemnity." A similar provision existed in the Roman civil law.

4. It is embodied, in different forms of language, into the written constitutions of most of the American states, but not generally, in terms requiring the indemnity concurrently with the appropriation. But practically that view has generally prevailed in the courts.[5]

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tution of this state, however, requires a previous compensation to be made. See also Cushman *v.* Smith, 34 Maine R. 247.

[3] 2 Kent's Comm. 340, (7th ed.) 393 and note. The Milwaukie & M. Railway Co. *v.* Elbe, 4 Chandler (Wis.) 72; Cushman *v.* Smith, 34 Maine, 247.

[4] Code Napoleon, Book II. Title II. 545.

[5] Lyon *v.* Jerome, 26 Wend. R. 485, 497; Opinion of *Walworth*, Ch., Case *v.* Thompson, 6 Wend. R. 634. In this case it was held, that it was not indispensable to the opening of a road over the land of an individual, that the price should be paid, or assessed even, before the opening of the road. And in Bonaparte *v.* C. & A. Railway Co. 1 Bald. C. C. R. 216, it was held, that a law taking private property, without providing for compensation, was not void, for it was said, that may be done, by a subsequent law. But the appropriation was enjoined, in that case, till compensation should be made. So also in Gardner *v.* The Village of Newburgh, 2 Johns. Ch. R. 162; Henderson *v.* The Mayor, &c. of New Orleans, 5 Miller's Louis. R. 416; Rogers *v.* Bradshaw, 20 Johns. R. 735; 12 Serg. & R. 366, 372; Haight *v.* Morris Aqueduct, 4 Wash. C. C. 601; O'Harra *v.* Lexington Railway, 1 Dana, 232; 1 Md. Ch. 387; 8 Eng. (Ark.) 199. In Bloodgood *v.* The Mohawk & Hudson River Railway Co. 14 Wend. 51, it is held that this constitutional requirement merely contemplates a legal provision for compensation, and not that such property shall be actually paid for, before taken. In Boynton *v.* The Peterboro' and Shirley Railway Co. 4 Cush. 467; 1 Am. Railw. C. 595, *Shaw*, Ch. J., says, "The right to damages for land taken for public use accrues and takes effect, at the time of taking, though it may be ascertained and declared afterwards. That time in the case of railroads, *primâ facie*, and in the absence of other proof, is the time of the filing of the location." Charlestown

*5. It was held in one case,[6] where the act of parliament gave the right to take lands for the purpose of building a turnpike-road,

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Branch Railway *v.* Middlesex, 7 Metcalf, 78; 1 Am. Railw. C. 383; Davidson *v.* Boston & Maine Railway, 3 Cush. 91.

In Massachusetts the remedy is limited to three years by statute, and the time begins from the filing of the location. Charlestown Branch Railway *v.* County Commissioners of Middlesex, 7 Met. 78; 1 Am. Railw. C. 383. So where a corporation, after locating a railway over a wharf more than sixty feet, and filing the location with the county commissioners, agreed with the owners of the wharf to extend the road on and over the same, before a certain day, and the owners, in consideration, agreed to demand no damages for the extension, and the road was constructed according to the location filed before the agreement. Held, that this was not an agreement not to extend the road more than sixty feet, and that the owners of the wharf were not thereby entitled to apply, after three years, from the filing of the location, for an estimate of the damages caused by an extension of the road more than sixty feet over the wharf. Plank Road Company *v.* Buffalo & Pittsburgh Railway, 20 Barb. 644. By the New York statute of 1851, railway companies have no right to enter upon, occupy, or cross a turnpike or plank road without consent of the owners, except on condition of first making compensation for damages to such turnpike or plank road company.

Shaw, Ch. J., in Boston & Providence Railway Corporation *v.* Midland Railway Co. 1 Gray, 360, says: "The effect of the location is to bind the land described to that servitude, and to conclude the land-owner and all parties having derivative interests in it, from denying the title of the company to their easement in it. We think, therefore, that the filing of the location is the taking of the land. It is upon that, the owner is forthwith entitled to compensation, it is that act which gives the easement to the corporation and the right to have damages to the owner of the land." See also Drake *v.* Hudson River Railway, 7 Barb. 552.

In those states, where the constitutions contain express provisions requiring a previous compensation, to the right to appropriate the land, as in Pennsylvania, Wisconsin, Kentucky, and Mississippi, the decisions upon this point would not be much guide, in regard to the general rule, in the absence of any express provision of the kind. But see Harrisburg *v.* Craigle, 3 Watts & Serg. 460.

And in some of the states, even where a concurrent right to compensation, with the appropriation of the land, is recognized, it seems to be considered by some, that a statute authorizing the appropriation of land for public uses, and which makes no provision for compensation, is not on that account unconstitutional. Opinion of the Chancellor in Rogers *v.* Bradshaw, 20 Johns. R. 735.

But the prevailing opinion, even in New York, seems to be, that the statute

6 Lister *v.* Lobley, 7 Ad. & Ellis, 124, Lord *Denman* says: "The amount of compensation cannot, generally, be ascertained till the work is done. The effect of the words in question is that they shall not do it without being liable to make compensation." It seems to have been supposed here that if the company did not make compensation, they might be compelled to do so by mandamus.

*making, or tendering satisfaction, that this need not be done before, or at the time of entering upon or taking the lands.

6. But this subject was largely discussed, in an early case in New York,[7] and finally determined, by the court of errors revers-

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should provide some available remedy for adequate compensation, and that unless that is done, the act, if not positively unconstitutional, is so defective, that no proceedings should be suffered under it, until compensation is secured, and that a court of equity should interfere. 2 Johns. Ch. 162; Rexford *v.* Knight, 1 Kernan, 308; Willyard *v.* Hamilton, 7 Ham. 112; Rubottom *v.* McClure, 4 Blackf. 505; McCormick *v.* Lafayette, 1 Smith, 85; Mercer *v.* McWilliams, Wright, 132.

Some cases have made a distinction (in regard to the necessity of a previously ascertained compensation being made and so situated, as to be capable of being made available to the owner of land, concurrently with its appropriation to public use,) between ordinary cases, and that class of cases where the property is put to the use of the state directly and that in such cases, it is not indispensable. Young *v.* Harrison, 6 Geo. 130.

And the grant of the right to bridge a navigable river, or arm of the sea, or to obstruct the flow and reflow of the tide upon the flats of private persons, although it may abridge their beneficial use, is not such an invasion of private property as to entitle the party to compensation. It is but the regulation of public rights, and if private persons thereby suffer damage, it is *damnum absque injuria.* Davidson *v.* Boston & Maine Railway, 3 Cush. 91. See also upon the subject generally, Zimmerman *v.* Union Canal Co. 1 Watts & S. 346; Philadelphia & Reading Railway *v.* Yeizer, 8 Barr, 366; 2 Am. Railw. C. 325; Commonwealth *v.* Fisher, 1 Penn. R. 467, and *ante*, § 63.

But it is very generally held, that in the absence of all express provision, by statute, in regard to the time, when compensation shall be made, the party is, at all events, entitled to have it ascertained and ready for his acceptance, concurrently with the actual appropriation of the estate to public use, and that he is not obliged to wait till the work is completed. People *v.* Hayden, 6 Hill (N. Y.) R. 359; Baker *v.* Johnson, 2 Hill, 342.

But no right to compensation vests in the land-owner till the acceptance and confirmation of the appraisal by the proper tribunal, under any statutory provisions, in most of the American states, and until that, the company may change the location of their road, and abandon proceedings pending against land-owner, on the first surveyed route, by paying costs already assessed. Hudson River Railway *v.* Outwater, 3 Sand. Sup. Ct. R. 689.

And where the statute of the state provides, that no valuation of property taken for railway and canal purposes need be made before taking possession of the same, in those cases where the property is not obscured, so that its value cannot be judged of, it was held there should be no unreasonable delay in having the valuation made. Compton *v.* Susquehannah Railway, 3 Bland. Ch. R. 442.

[7] Bloodgood *v.* M. & H. Railway Co. 14 Wend. 51; s. c. 18 id. 9, 59. See also upon this subject, Fletcher *v.* Auburn & Syracuse Railway, 25 Wend. 462; Smith *v.* Helmer, 7 Barb. 416; Pittsburgh *v.* Scott, 1 Barr, 309; People *v.* Michigan Southern Railway, 3 Gibbs, 496. In this case it is said the party who makes

ing the judgment of the court below, that if provision was made for compensation in the act, giving power to take the lands, it was not indispensable that the amount should be actually ascertained and paid before the appropriation of the property.

7. In Mississippi it is required, by the constitution of the state, that the compensation be paid before the right to use the land is *vested.[8] So also in Georgia the title does not vest in the company until the ascertained compensation is paid or tendered.[9] A similar decision was made by the Supreme Court of the United States,[10] where the charter of the company provided that the payment, or tender, of the valuation, should vest the estate in the company, as fully as if it had been conveyed. And a similar decision was also made by the Supreme Court of Vermont.[11]

8. In one case in North Carolina,[12] it was held that compensation need not be made prior to appropriating land for public use. The constitution of the state is said to contain no prohibition against taking private property for public use, without compensation. And the same is true of the constitution of South Caro-

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no application for compensation for many years, should be regarded as having waived all claim. p. 506. See also Smith *v.* McAdam, 3 Gibbs, 506.

[8] Stewart *v.* Raimond Railway Co. 7 Smedes & M. 568. See also Thompson *v.* Grand Gulf Railway, 3 Howard (Miss.) R. 240.

[9] Doe *v.* The Georgia Railway Banking Co. 1 Kelly, 524.

[10] Baltimore & Susquehannah Railway Co. *v.* Nesbit, 10 How. 395.

[11] Stacy *v.* Vermont Central Railway Co. 27 Vt. R. 39. The opinion of *Isham*, J., in this case, will show the correlative rights of the company and land-owner, and by what act the right of each becomes perfected. Where the statute requires the company to contract in writing, it is not competent to show title in any other mode, unless by formal conveyance. Harborough *v.* Shordlow, 2 Railw. C. 253; 7 M. & W. 87. In Graff *v.* The City of Baltimore, 10 Md. R. 544, it was held that under a statute for enabling the city to supply pure water, and to take land upon valuation by a jury, and compensation to the owners, and that where "such valuation is paid, or tendered, to the owner or owners" of the property, it "shall entitle the city to the use, estate, and interest in the same, thus valued, as fully as if it had been conveyed by the owners," that the city is not bound by the mere inquisition and judgment thereon, but could rightfully abandon the location, and that payment, or tender, under the statute, was indispensable to the vesting of the title. But it was held, that the city may be made liable, in another form of proceeding, to the land-owner, for any loss or damage he may have sustained, by reason of the conduct of the municipal authority in the premises.

[12] R. & G. Railway Co. *v.* Davis, 2 Dev. & Bat. R. 451. But in New Jersey it was held that the supervisors, in laying out roads, are bound to award damages to land-owners, with their return, or the whole proceeding is illegal and void. 3 Zab. 388.

lina. And the latter state held[13] that private property might be taken without compensation. But this decision is certainly at variance with the generally received notions upon that subject, since the period of the Roman Empire.

*SECTION XII.

APPRAISAL INCLUDES CONSEQUENTIAL DAMAGES.

1. *Consequential damage barred.*
2. *Such as damage, by blasting rock.*
3. *But not where other land is used unnecessarily.*
4. *But loss by fires, obstruction of access, and cutting off springs is barred.*
5. *Loss by flowing land not barred.*
6. *Damages, from not building upon the plan contemplated, are barred.*
7. *Special statutory remedies reach such damages.*
8. *Exposure of land to fires.*

§ 74. 1. It is requisite that the tribunal appraising land damages, for lands condemned for railways, should take into consideration all such incidental loss, inconvenience, and damage, as may reasonably be expected to result from the construction and use of the road, in a legal and proper manner. And as all tribunals, having jurisdiction of any particular subject-matter, are presumed to take into consideration all the elements legally constituting their judgments, such incidental loss and damage will be barred, by the appraisal, whether in fact included in the estimate, or not.

2. Hence damage done by the contractors, to the remaining land, by blasting rocks, in the course of construction, has been held to be barred, as included in the estimated compensation for the land taken.[1]

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[13] State *v.* Dawson, 3 Hill, (S. C.) R. 100. In this case Mr. Justice *Richardson* dissents from the decision of the court, and it is generally allowed, that his opinion contains the better law. His argument, in the language of the author of the Commentaries, vol. 2, *ubi supra*, "was very elaborate and powerful." See Louisville Railway Co. *v.* Chappell, 1 Rice, 383; 2 Bay, 38.

[1] Dearborn *v.* Boston, Concord, & Montreal Railway, 4 Foster, 179, 187; Sabin *v.* Vermont Central Railway, 25 Vt. R. 363; Dodge *v.* The County Commissioners, 3 Met. R. 380. But in Hay *v.* Cohoes Company, 2 Comst. 159, the defendants, a corporation, dug a canal upon their own land, for the purposes authorized by their own charter. In so doing it was necessary to blast rocks, and the fragments were thrown against and injured the plaintiff's dwelling, upon land adjoining, and it was held the defendants were liable to a special action for the injury, although no negligence, or want of skill, was alleged or proved; and in

*3. But it was held that this did not preclude the land-owner from recovering damages, for using land adjoining the land taken

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Tremain *v.* Cohoes Company, 2 Comst. 163, a precisely similar action, it was held that evidence to show the work done in the most careful manner, was inadmissible, there being no claim for exemplary damages.

But there is probably an essential difference between the case of a railway, in the construction of which, blasting rocks is almost indispensable, and that of a manufacturing company, or other proprietor, who may find it convenient to blast rocks, upon his premises, to increase their utility, or beauty. But for doing what the act does not authorize, or doing what it does authorize, improperly, a railway company is liable to an action. Turner *v.* Sheffield & R. Railway, 10 M. & W. 425.

In Carman *v.* Steubenville & Ind. Railway, 4 Ohio St. R. 399, it seems to be taken for granted, that throwing fragments of rock, by blasting, upon the land of adjoining proprietors, is an actionable injury, and as in this case it was done by the contractor in the performance of his contract, in the manner stipulated, the company were held liable.

The result of the cases would seem to be, that where the damage done, by blasting rocks, or in any similar mode, in the course of the construction of a railway, is done to land, a portion of which is taken by the company, under compulsory powers, this damage will not lay the foundation of an action, in any form, as it should be taken into account, in estimating the compensation to the land-owner, for the portion of land taken. Brown *v.* Prov. Warren, & Bristol Railway, 5 Gray. And if not included in the appraisal, it is nevertheless barred. Dodge *v.* County Commissioners, *supra.*

But if the damage is done to land, no part of which is taken, and where no land of the same owner is taken, it may be recovered, under the statute, if provision is made for giving compensation for consequential damage, or where lands are "injuriously affected." But if the statute contain no such provision, the only remedy will be by a general action. And in this view many of the cases cited above seem to assume, that blasting rocks, by an ordinary proprietor of land, is a nuisance to adjoining proprietors, if so conducted as to do them serious damage. And this is the ground upon which the case of Carman *v.* Steubenville & Ind. Railway is decided, without much examination of this point, indeed, and by a divided court. But if a railway is not liable for necessary consequential damage, unless the statute gives a remedy, (*post*, § 75,) it may perhaps be questioned how far a recovery could be maintained, in a general action, for damage done by blasting rocks, as that is confessedly within the range of their powers. See opinion of *Shaw*, Ch. J., in Dodge *v.* County Commissioners, 3 Met. 383: "An authority to construct any public work carries with it an authority to use the appropriate means. An authority to make a railway is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precaution can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work; and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that

* for a cart-way, where six rods were allowed to be taken, by the company, throughout the line of the road, which would give ample space for cart-ways upon the land taken.[2] But it was held in another case, that the company were not liable, for entering upon the adjoining lands, and occupying the same with temporary dwellings, stables, and blacksmith shops, provided no more was taken than was necessary for that purpose.[3]

4. So it is settled that the appraisal of land damages is a bar to claims for injuries by fire, from the engines obstructing access to buildings, exposing persons, or cattle to injury, and many such risks.[4] And it will make no difference, that the damages were not known to the appraisers, or capable of anticipation, at the time of assessing land damages;[5] as where a spring of water is

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the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute.

" Of course, this reasoning will not apply to damages occasioned by carelessness or negligence in executing such a work. Such careless or negligent act would be a tort, for which an action at law would lie against him who commits, or him who commands it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it alike is within the letter and the equity of the statute, and the county commissioners have authority to assess the damages. This court are therefore of opinion, that an alternative writ of mandamus be awarded to the county commissioners, to assess the petitioners' damages, or return their reasons for not doing so."

[2] Sabin *v.* Vermont Central Railway, 25 Vt. R. 363.

[3] Lauderbrun *v.* Duffy, 2 Penn. St. R. 398. But it seems questionable whether this case can be maintained as a general rule.

But if a party is entitled to compensation for injuries of this kind, as where his lands adjoining the railway, and no part of which is taken, are injuriously affected, as by blasting rocks, his only remedy is under the statute. Dodge *v.* County Commissioners, 3 Met. R. 380.

[4] Phila. & Reading Railway *v.* Yeiser, 8 Barr, 366; s. c. 2 Am. Railw. C. 325; Aldrich *v.* Cheshire Railway, 1 Foster, 359; s. c. 1 Am. Railw. C. 206; Mason *v.* Kennebec & Port. Railway, 31 Maine, 215. See also Furness *v.* Hudson River Railway, 5 Sand. R. 551; Huyett *v.* Phil. & Read. Railway, 23 Penn. R. 374; *ante*, § 71, 72.

[5] Aldrich *v.* Cheshire Railway, *supra*. But see Lawrence *v.* Great Northern Railway, 4 Eng. L. & Eq. R. 265.

So also where the company's works cut off a spring of water, below high-water mark, on a navigable river, it was held the riparian owner was entitled to claim damages of them on that account, in a proceeding under the statute. Lehigh Valley Railway *v.* Trone, 28 Penn. R. 206.

cut off by an excavation for the bed of a railway fifteen feet below the surface, from which the plaintiff's buildings had been supplied with water.

5. But it was held, that where, in the construction of a canal, with waste weirs, erected by direction, and under the inspection of the commissioners appointed to designate the route of the canal, with all the works connected therewith, and to appraise damages, the waste water, after flowing over the land of adjoining proprietors, flowed upon the land of the plaintiff, and thereby greatly injured it, that he was entitled to recover damages.[6]

6. And where the appraisal of land damages is reduced below what it otherwise would have been, by the representations of the agents of the company, that the road would be constructed in a particular manner, made at the time of the appraisal, to the commissioners, and which representations are not fulfilled in the

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[6] Hooker *v.* New Haven & Northampton Co. 14 Conn. R. 146; s. c. 15 Conn. 312.

But in such case, the owner of property overflowed by water, through the defective construction of a railway, is bound to use reasonable care, skill, and diligence, adapted to the occasion, to arrest the injury, and if he do not, notwithstanding the first fault was on the part of the company, he must be regarded as himself the cause of all damage, which he might have prevented by the use of such care, diligence, and skill. Chase *v.* The N. Y. Central Railw. 24 Barb. R. 273.

The same rule was adopted by a special referee, in Lemmex *v.* Vermont Central Railw., in regard to damage to wool, by being exposed to rain, at one of the company's stations, through the fault of the agents of the company, where the owner did not remove it, as soon after he obtained knowledge of its condition, or take as effective measures to arrest the injury as he reasonably should have done. It was held the company were only liable for such damage as necessarily resulted from their own fault, and beyond that the plaintiff must be regarded as the cause of his own loss. See also *post*, § 180.

The assessment of compensation for land taken for a railway, covers all damages whether foreseen or not, and whether actually estimated or not, which result from the proper construction of the road. But the company are liable to an action for damages resulting to any one, from the defective construction of their road. In the present case the plaintiff's meadows were injured, in consequence of the insufficient culverts in the defendant's road, there being no impediment to the construction of proper ones. Suitable bridges and culverts to convey the water across the railway, at or near the places where it naturally flows, are necessary to the proper construction of the road, except where they cannot be made, or where the expense of making them is greatly disproportionate to the interests to be preserved by them. Johnson *v.* At. & St. Law. Railway, June T. 1857, New H. Sup. Court, 20 Law Rep.

actual * construction of the road, whereby the plaintiff sustained serious loss and injury, it was held, that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained, for constructing the railway contrary to such representations, provided it was done in a prudent and proper manner.[7]

7. But where no part of the plaintiff's land is taken, and the statute gives all parties suffering damage, by the construction of railways, the right to recover, as in England, and some of the American states, and the water is drawn off from plaintiff's well, upon lands adjoining the railway, he may recover.[8] So too may the proprietor of a mill-pond recover damages, sustained by the construction of a railway across the same, although the dam were authorized, by the legislature, upon a navigable river; and in constructing it, the conditions of the act were not complied with.[9]

9. But it has been held that the appraisers are not to estimate increased damages to a land-owner, in consequence of the exposure of the remaining land to fires, by the company's engines.[10] Nor can any common-law action be sustained for such damage unless where actual loss intervenes, through the negligence of the company.[10]

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7 Butman *v.* Vt. C. Railway Co. 27 Vt. R. 500. See also Railway Co. *v.* Washington, 1 Rob. R. 67; B. & S. Railroad Co. *v.* Compton, 2 Gill, 28; *ante*, § 71; Kyle *v.* Auburn & Roch. Railway, 2 Barb. Ch. R. 489. But see Wheeler *v.* Roch. & Sy. Railway, 12 Barb. 227, where it is held that a railway company will be enjoined from building a road-crossing at a different place from that named at the time damages were assessed. *Post*, § 93, Appendix B.

8 Parker *v.* Boston & Maine Railway, 3 Cush. 107.

9 White *v.* South Shore Railway, 6 Cush. R. 412.

10 Sunbury & Erie Railway *v.* Hummel, 27 Penn. R. 99, *Lewis*, Ch. J., and *Black*, J., dissenting. The general current of authority seems to us with the minority of the court. And in Lehigh Valley Railw. *v.* Lazarus, 28 Penn. R. 203, the case of Yeizer, 8 Barr, 366, *ante*, n. 4, is regarded, by the reporter of that state, as overruled. But in an action of trespass against a railway company for constructing their road through plaintiff's land, and thereby preventing his cattle thriving, this latter injury is not so remote a consequence of the act charged that it may not be made a ground of claiming damage, when specially alleged in the declaration. Baltimore and Ohio R. *v.* Thompson, 10 Md. R. 76. If we understand the ground assumed by the court in Pennsylvania, at the present time, it is, that an injury to buildings, standing near the line of railway, by fire from the companies' engines, when properly constructed and prudently managed, is too

SECTION XIII.

ACTION FOR CONSEQUENTIAL DAMAGES.

1. *Statute remedy for lands "injuriously affected."*
2. *Without statute not liable to action.*
3. *Are liable for negligence in construction, or use.*
4. *Statute remedy exclusive.*
5. *Minerals reserved.*

§ 75. 1. The liability of railways for consequential damage to the adjoining land-owners, must depend upon the provisions in

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remote and uncertain, to form an element in estimating damages to the land-owner, either when part of the land is taken, or the statute provides for damages to all persons "injuriously affected" by the company's works. We are entirely conscious of the embarrassment attending all attempts to define the class of injuries, which do, or which do not, come within the rule of legal consequential injuries, by the construction or operation of railways. But it seems important to distinguish between a railway, as one of the legitimate uses to which the proprietor of land might put it, for the purpose of private transportation, and upon which he might no doubt use locomotive steam engines; and the use of such engines upon a public railway.

In the former case the land-owner would not be liable to an adjoining proprietor except for want of care, skill, or prudence in the construction, or use of his engines. The same would probably be true of a public company, if the legislature did not subject them to any consequential damage resulting from the nature of their business. But where they are, as in England, and many of the American states, made liable either as part of the price of land taken, or as a distinct ground of claim, to all consequential damage caused to the land-owner, both by the construction and operation of their road or either of them, in a prudent and proper manner, it seems difficult to escape the conclusion, that the exposure of property along the line of a railway to loss, by fires communicated by the companies' engines, is one of the most direct sources of consequential injury, which can be imagined. It is more direct and substantial than that from noise, dirt, dust, smoke, and vibration of the soil, all which, under circumstances, have been held proper elements to be considered. Perhaps none of them are absolutely grounds of giving damage in all cases. They depend very much upon the nearness of the track to the land. And other circumstances may perhaps deserve consideration, in many cases. But where the track passes directly through lands, near where buildings are already erected, it is difficult to conjecture upon what ground it could be claimed, that the increased exposure to fire was not a serious detriment to the owner. It is certain it must very seriously enhance the rate of insurance, and proportionally diminish the value of the rent, and of the buildings.

As was said by *Shaw*, C. J., 10 Cush. R. 385, it is incumbent upon one who claims damage, on this ground, that the company's track run so near his buildings "as to cause *imminent* and *appreciable* danger by fire." When it is undertaken

*their charters, and the general laws of the state. In England railway companies are, by express statute,[1] made liable to the owners of all lands "injuriously affected" by their railways. And under this statute it has been determined, that if the company do any act, which would be an actionable injury, without the protection of the special act of the legislature, they are liable under this statute.[2] So that there, any act of a railway company amounting to a nuisance in a private person, and causing special damage to any particular land-owner, is good ground of claiming damages under this section of the statute.[3]

2. But in the absence of all statutory provision upon the subject, railways are not liable for necessary consequential damages, to land-owners, no portion of whose land is taken, where they construct and operate their roads in a skilful and prudent manner.[4]

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to be decided, as a question of law, that in no case is danger from fire, by the proper use of the company's engines, to be considered in estimating land damages, it is certainly contrary to the general course of decisions upon the subject, if not to the very principle, upon which such companies have been subjected to such damages as they cause to land-owners, beyond what accrues from the ordinary use of lands for building and agricultural purposes. *Post*, § 82.

[1] 8 & 9 Vict. c. 8, § 68.

[2] Glover *v.* The North Staffordshire Railway Co. 5 Eng. L. & Eq. R. 335; *post*, § 82.

[3] Hatch *v.* Vt. Central Railway Co. 25 Vt. R. 49. See § 82, *post.*

[4] Monongahela Nav. Co. *v.* Coon, 6 Watts & S. 101; Radcliffe *v.* The Mayor of Brooklyn, 4 Comstock, 195; Phil. & Trenton Railway Co. 6 Wharton, R. 25; Seneca Road Co. *v.* Aub. & Roch. Railway Co. 5 Hill, (N. Y.) R. 170; Hatch *v.* Vt. Central Railway, 25 Vt. R. 49; Richardson *v.* Vt. Central Railway Co. 25 Vt. R. 465.

There are many other cases confirming the same general view stated in the text. Henry *v.* Pittsburgh & Alleghany Bridge Co. 8 Watts & Serg. 85; Canandaigua & Niagara Railway *v.* Payne, 16 Barb. 273, where it is held, that injury to a mill upon another lot of the same land-owner, in consequence of the construction and operation of the railway, is a matter with which the commissioners have nothing to do in estimating damages for land. So in Troy & Boston Railway *v.* Northern Turnpike, 16 Barb. 100, it was held that the consideration that the business of a turnpike, which claimed damage, would be diminished, by the construction of the railway along the same line of travel, should be disregarded in estimating damage to such turnpike. "Every public improvement," say the court, "must affect some property favorably, and some unfavorably, from the necessity of the case. When this effect is merely consequential the injury is *damnum absque injuria*. Though their property has undoubtedly depreciated by the construction of the railway, yet the turnpike company enjoy all the rights and privileges secured to them by their charter, and no vested rights have been violated."

*3. But if the railways are guilty of imprudence, or want of skill, either in the construction or use of their road, they are

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Nor is one entitled to damage, in consequence of a highway being laid upon his line, thus compelling him to maintain the whole fence. Kennett's Petition, 4 Foster, 139. In Albany Northern Railway *v.* Lansing, 16 Barb. 68, it is said, "The commissioners, in estimating the damages, should not allow consequential and prospective damages."

In Plant *v.* Long Island Railway, 10 Barb, 26, it is held not to be an illegal use of a street, to allow a railway track to be laid upon it, and that the temporary inconvenience, to which the adjoining proprietors are subject while the work of excavation and tunnelling is going on is *damnum absque injuria*. So also in regard to the grade of a street having been altered, by a railway, by consent of the common council of the city of Albany, who by statute, were required to assess damages to any freeholder injured thereby, and who had done so in this case, it was held, that no action could be maintained against the railway. Chapman *v.* Albany & Sch. Railway, 10 Barb. 360; Adams *v.* Saratoga & Wash. Railway, 11 Barb. 414.

And in a late case in Kentucky, Wolfe *v.* Covington & Lexington Railway, 15 B. Monr. 404, it was held, the municipal authority of a city might lawfully alter the grade of a street, for any public purpose, without incurring any responsibility to the adjacent landholders, and might authorize the passage of a railway through the city, along the streets, and give them the power to so alter the grade of the streets, as should be requisite for that purpose, this being done, at the expense of the company, and by paying damage to such adjacent proprietors as should be entitled to them. But one, who urged the laying of the road in that place, on the ground that it would benefit him, and who was thereby benefited, cannot recover damages of the company, upon the maxim, "*volenti non fit injuria*." A railway, when so authorized, "is not a *purprestur*e, or encroachment upon the public property or rights."

And where a railway company erect a fence upon land which they own in fee, for the purpose of keeping the snow off their road, they are not liable for damages sustained by the owner of land upon the opposite side of the fence, by the accumulation of snow, occasioned by the fence. Carron *v.* Western Railway, Mass. Sup. Court, 20 Law Rep. 350. See also Morris & Essex Railw. *v.* Newark, 2 Stock. Ch. R. 352.

And where the act complained of is the construction of an embankment, by a railway company, at the mouth of a navigable creek, in which the plaintiff has a prescriptive right of storing, landing, and rafting lumber, for the use of his sawmill, whereby the free flow of the water is obstructed, and the plaintiff thereby deprived of the full enjoyment of his privilege, the injury is regarded as the direct and immediate consequence of the act of the company, and they are liable for the damages thereby sustained. Tinsman *v.* The Belvidere Delaware Railw. Co. 2 Dutcher, 149.

See also Rogers *v.* Kennebec & Portland Railway, 35 Me. R. 319; Burton *v.* Philadelphia & C. Railway, 4 Harr. 252; Hollister *v.* Union Co. 9 Conn. R. 436; Whittier *v.* Portland & Kennebec Railway, 38 Maine R. 26.

liable to any one suffering special damage thereby,[5] as in needlessly diverting watercourses and streams, and not properly restoring them,[5] whereby lands are overflowed or injured.[5]

4. And the remedy given by statute, for taking, or injuriously affecting lands is exclusive of all remedies, at common law, by action, or bill in equity, unless provided otherwise in the statute.[6]

5. But in a late English case,[7] the House of Lords held, that a *railway company which had been condemned to pay for land, the owner reserving the minerals, were not liable to the landowner, by reason of his inability to work a mine, which he had discovered under the railway. The Lord Chancellor said, "The conveyance of the surface of land gives to the grantor an implied right of support, sufficient for the object contemplated, from the soil of the grantor, adjacent as well as subjacent."

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[5] Whitcomb *v.* Vt. Central Railway Co. 25 Vt. R. 69; Hooker *v.* N. H. & N. Y. Railway Co. 14 Conn. 146; *post*, § 79. And there is the same liability although the lands are not situate upon the stream. Brown *v.* Cayuga & Susquehannah Railway, 2 Kernan, 486.

[6] Regina *v.* Eastern Counties Railway, 3 Railw. C. 466. But in this case the act expressly provided, that the verdict and judgment should be conclusive and binding, which most railway acts do not; but it seems questionable if this will make any difference. 3 Eng. L. & Eq. R. 59; *post*, § 81.

[7] Caledonia Railway *v.* Sprot, House of Lords, 39 Eng. L. & Eq. R. 16. But in Bradley *v.* New York & New H. Railway, 21 Conn. R. 293, where the defendants' charter gave them power to take land, and made them liable for all damages to any person or persons, and they excavated an adjoining lot to plaintiff's, so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light, and render it otherwise unfit for use, it was held, that this did not constitute a taking of plaintiff's land, but that defendants were liable to consequential damage under their charter.

But in the early case of the Wyrley Nav. *v.* Bradley, 7 East, R. 368, it is considered, that where the act of parliament reserved the right to dig coal to the proprietor of mines, unless the company, on notice, elected to purchase and make compensation, where the canal was damaged by the near approach of the mine, after such notice, and no compensation made, that the coal-owner was not liable, although it is there said to be otherwise in case of a house, undermined by digging on the soil of the grantor. But this case seems to turn upon the reservation in the grant.

SECTION XIV.

RIGHT TO OCCUPY HIGHWAY.

1. *Decisions conflicting.*
2. *First held that owners of the fee were entitled to additional damages.*
3. *Principle seems to require this.*
4. *Many cases take a different view.*
5. *Legislatures may and should require such additional compensation.*
6. *Courts of equity will not enjoin railways from occupying streets of a city.*
7. *Some of the states require such compensation.*

n. 9. *All do not. But the English courts principle, and many of the state courts. do require it, as matter of right.*

§ 76. 1. The decisions are contradictory, in regard to the right of a railway company to lay its track along a common highway, without making additional compensation to land-owners adjoining such highway, and who, in the country, commonly own to the middle of the highway.

2. In some of the early cases, upon this subject, it seems to have been considered, that, under such circumstances, the land-owners were entitled to additional compensation, when the land was converted from a common carriage-way to a railway.[1]

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[1] Trustees of the Presbyterian Society in Waterloo *v.* The Auburn & Rochester Railway Co. 3 Hill (N. Y.) R. 567. The case of Fletcher *v.* Auburn & Syracuse Railway Co. 25 Wend. 462, might have been put upon the same ground, but is not. The ground assumed is, that the land-owners are entitled to consequential damage, in consequence of the new use, to which the land is put, which amounts to nearly the same thing. Philadelphia & Trenton Railway, 6 Wharton, 25; Miller *v.* The Auburn & Syracuse Railway Co. 6 Hill (N. Y.) R. 61; Mahon *v.* Utica & Schenectady Railway, Lalor's Supp. to Hill & Denio, 156. And in Ramsden *v.* The Manchester South Junction & Alt. Railway, 1 Exch. R. 723, the Court of Exchequer expressly decide, that a railway company has no right even to tunnel under a highway, without making previous compensation to the land-owner. Seneca Road *v.* Auburn Railway, 5 Hill, 170; 3 Foster, 83. But a distinction is taken between the property of adjoining land-owners in the highway or street in cities, and in the country. In the former it has been held that the fee of the streets is under the sole control of the municipal authorities, and that it is no perversion of the legitimate use of the streets, to allow a railway company to lay their track upon them. Plant *v.* Long Island Railway, 10 Barb. 26; Adams *v.* Saratoga & Washington Railway, 11 Barb. 414; Chapman *v.* Albany & Schenectady Railway, 10 Barb. 360; Drake *v.* Hudson River Railway, 7 Barb. 508; Applegate *v.* Lexington & Ohio Railway, 8 Dana, 289; Wolfe *v.* Covington & Lexington Railway, 15 B. Monr. 404.

In Williamson *v.* New York Central Railway, 18 Barb. 222, 246, the court say: "A railroad is only an improved highway, and the use of a street, by a railway,

*3. There is certainly great reason in this view, inasmuch as the land-owner's entire damage is to be assessed, at once, and it

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is one of the modes of enjoying a public easement." But see this case reversed, *post*. A general power to pass highways in the construction of a canal, or railway, has been held to include turnpikes also. Rogers *v.* Bradshaw, 20 Johns. 735; White River Turnpike Co. *v.* Vermont Central Railway, 21 Vt. R. 590. But the grant of a railway from one terminus to another, without prescribing its precise course and direction, does not, *primâ facie*, confer power to lay out the railway upon and along an existing highway. But it is competent for the legislature to grant such authority, either by express words, or necessary implication; and such implication may result, either from the language of the act, or from its being shown, from an application of the act, to the subject-matter, that the railway cannot, by reasonable intendment, be laid in any other line. Springfield *v.* Connecticut River Railway, 4 Cush. 63; 1 Am. Railw. C. 572. But in general the adjoining owner of land to a highway, is entitled to additional compensation, where it is put to a different and more dangerous use. And towns have an interest in highways and bridges, which will enable them to maintain an action upon the case for their obstruction or destruction, and the conversion of the materials. Troy *v.* Cheshire Railway, 3 Foster, 83. But the town is not liable to pay damages assessed, by the selectmen, in laying out a highway, at the request of a railway company, made necessary to supply the place of one taken by the company for their track. Ellis *v.* Swanzey, 6 Foster, 266.

In general it may be stated as the settled doctrine of most of the states, that the owner of land, bounded upon a highway, owns to the centre of the way. Buck *v.* Squiers, 22 Vt. R. 484, 495. The general rule as to monuments, referred to in deeds of land, undoubtedly is, that the centre of such monuments is intended, whether it be stake, stones, tree, rock, or a highway, or stream. It is undoubtedly more a rule of policy, than of intention, and as such, to answer its end, should be applied, in every case, unless a clearly defined intention to the contrary be made to appear. 3 Kent's Comm. 433; Chatham *v.* Brainerd, 11 Conn. R. 60; Champlin *v.* Pendleton, 13 Conn. R. 23; 8 Wend. 106; Starr *v.* Child, 20 Wend. 149; s. c. 4 Hill, 369; Canal Comm. *v.* People, 5 Wend. 423; s. c. 13 Wend. 355; Johnson *v.* Anderson, 18 Me. 76; Buckman *v.* Buckman, 3 Fairfield, 463; Leavitt *v.* Towle, 8 N. Hamp. 16, 96; Dovaston *v.* Payne, 2 Smith's Leading Cases, 90, and notes by Wallace & Hare; Nicholson *v.* New York & New Haven Railway, 22 Conn. R. 74.

But the owner of the fee of land, over which a highway passes, cannot maintain a bill in equity, to enforce an order of commissioners, as to the manner of constructing a railway, where it crosses the highway, but the same should be brought by the principal executive officers of the town or city. Brainerd *v.* Conn. River Railway, 7 Cush. 506. The court say: "It is only where the owner suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him, and certainly no rule of law rests on a wiser or more sound policy. Were it otherwise, suits might be multiplied to an indefinite extent, so as to create a public evil, in many cases, much greater than that which was sought to be redressed." Stetson *v.* Faxon, 19 Pick. 147;

could *never be done understandingly, unless the use to which it

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Proprietors of Quincy Canal *v.* Newcomb, 7 Met. 276; Smith *v.* Boston, 7 Cush. 254; Hughes *v.* Providence & Worcester Railway Co. 2 Rhode Island R. 493.

In Williams *v.* Natural Bridge Plank Road Co. 21 Missouri R. 580, it is held, that the grant of the right of locating a plank road, upon a county road, does not exclude the idea, that the owner of the soil, over which the road passes, should have compensation, for any injury he may sustain, by converting a county road into a plank road. This case is put, by the court, upon the ground, that the plank road is an additional burden upon the soil, and that for this, the land-owner is as much entitled to compensation, as if his land had originally been taken for the purpose of the plank road, and that to deny all redress, in such case, is a virtual violation of that article of the constitution giving compensation to the owner of property taken for public use.

This is undoubtedly the rule of the English law, and of reason and justice, and we should rejoice to see it prevail more extensively, in this country. The American courts seem to have been sometimes led astray, upon this subject, by the fallacy, that a railway is merely an improved highway, which for many purposes it is, but not for all, any more than a canal. See also Railroad, *ex parte*, 2 Rich. 434.

And the New York statute giving railways the right to pass upon, or over turnpikes, plank roads, rivers, &c., by restoring such ways, rivers, &c., so as not unnecessarily to have impaired their usefulness, was construed not to preclude a plank road from recovering of the railway, all damages sustained by them, in a common action for damages, under the code, the company having entered upon the plank road, without causing damages to be assessed under the statute. Ellicotville Plank Road *v.* Buffalo, &c. Railway, 20 Barb. 644. As the New York Court of Appeals have changed the rule upon this subject, in that state, since the body of this work was through the press, in the former edition, and only a note of the case was inserted, at the close of that edition, we deem it proper here to present the opinion at length. Williamson *v.* New York Central Railway, 20 Law Reporter, 449. The point decided is that the dedication of land to the use of the public, as a highway, does not authorize it being taken, by a railway company, for their track, without compensation to the owner of the fee, although done by the consent of the legislature, and of the municipal authorities.

Selden, J.—"This is a suit in equity, the object of which is to obtain a perpetual injunction, restraining the defendants from continuing to use and occupy with their railway a portion of a certain highway or street in the village of Syracuse, known as Washington street, and to recover damages for past occupation.

"Washington street was gratuitously dedicated to the use of the public by the plaintiff and others, through whose land it was laid, and the Utica and Syracuse Railroad Company, to the rights and liabilities of which the defendants have succeeded, constructed their railway upon it, without making any compensation to the plaintiff, and without his consent. At the time the track was laid, the plaintiff was the owner of a large number of lots fronting upon the street, a portion of which he has since sold, with a reservation of his claim against the railway company for damages, and a portion of which he still owns. The damages which

were to be put were known to the assessors. And it is obvious,

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have accrued both upon the sold and unsold portions of the premises are claimed in this suit.

The defendants, in justification of their occupation of the street, show that the charter of the Utica and Syracuse Railroad, Session Laws of 1836, p. 819, § 11, declares that their road might "intersect," and be built upon any highway, and that this right is confirmed by the general railway act of 1850.

They also show the express consent of the municipal authority of the city of Syracuse to such occupation. The principal question, therefore, and the only one which I deem it necessary to consider, is, whether the state and municipal authorities combined, could confer upon the railway company the right to construct their road upon this street without obtaining the consent of, or making compensation to the plaintiff.

If the railway encroaches in any degree upon the plaintiff's proprietary rights, then it is clear that the constitutional inhibition which forbids the taking of private property for public use "without just compensation," applies to the case.

It is conceded that, by the dedication, the public acquired no more than the ordinary easement, or a right to use the premises as a highway, and that the plaintiff continues the owner in fee in respect to the unsold lots to the centre of the street, subject only to this easement. But it is contended that the taking and use of the street by the railway company, does not encroach upon the reserved rights of the plaintiff, because the use of a street for the purposes of a railway, is only "one of the modes of enjoying the public easement." . . . . . .

[After examining various cases, which, the learned judge said, "may be considered as settling that a railway in a populous town is not a nuisance *per se*, and that when the railway company has acquired the title to the land upon which its road is located, such company being in the exercise of a lawful right, is not liable, unless guilty of some misconduct or negligence, for any consequential injuries which may result to others from the operation and use of its road; but they decide nothing whatever in regard to the question to be considered in this case,"—he proceeded:] "There is also another class of cases in which, although the injury complained of is to the corporeal rights of the plaintiff, yet, being merely consequential, and no direct trespass or unauthorized intrusion upon the plaintiff's property being alleged, the question under consideration here could not arise. Such are the cases of Fletcher *v.* The Auburn and Syracuse Railroad Co. 25 Wend. 464, and Chapman *v.* Albany and Schenectady Railroad Co. 10 Barb. 360." In these and the like cases, the title of the company to the ground on which its road is built, is not disputed. It is unnecessary, therefore, to notice them further here.

We come then to the consideration of the cases which do bear, with more or less weight, upon the question to be decided, and upon which, so far as authority is concerned, its decision must mainly depend. The first among these cases, in the order of time as well as of importance, is that of The Presbyterian Society of Waterloo *v.* The Auburn and Rochester Railroad Co. 3 Hill, 567. The declaration was in trespass for entering upon the plaintiff's premises, digging up the soil, and constructing their railway track upon it. The defence was, that the *locus in*

that it would ordinarily be attended with far more damage to

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quo was a public highway, and that the charter of the company expressly authorized it to construct its road upon and across any highway. The point, therefore, was presented in the most direct manner possible, and the defence most emphatically overruled. The language of Chief Justice *Nelson* is most pertinent and forcible. He says: "But the plaintiffs' were not divested of the fee of the land by the laying out of a highway; nor did the public thus acquire any greater interest therein than a right of way, with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the limits of the road in a reasonable manner, for the purpose of making and repairing the same, subject to this easement, and this only. The rights and interests of the owners of the fee remained unimpaired.

'It is quite clear, therefore, even if the true construction of the eleventh section accords with the view taken by the counsel for the defendants, that the legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated in pursuance of the highway act, without first providing a just compensation therefor.'

"It was argued in that case, as in this, that using the road for a railway was only a different mode of exercising the right which had been acquired by the people; that the use was virtually the same, that of accommodating the travelling public. But the argument met with no favor from the court. Judge *Nelson* says: "It was said on the argument, that the highway is only used by the defendant for the purposes originally designed—the accommodation of the public, and for this compensation has already been made. This argument might have been used with about the same force in the case of Sir John Lade *v.* Shepherd, 2 Strange, 1004."

He adds, on this subject: "The claim set up, (by the defendant,) is an easement, not a right of passage to the public, but to the company, who have the exclusive privilege of using the track of the road in their own peculiar manner. The public may travel with them over the track, if they choose to ride in their cars."

This case which was decided by our late supreme court upon full consideration, and in so emphatic a manner, ought to be conclusive, unless it appears upon principle to be erroneous. . . . . .

It will not be seriously and cannot be successfully contended, either that the dedication of land for a highway gives to the public an unlimited use, or that the legislature have the power to encroach upon the reserved rights of the owners, by materially enlarging or changing the nature of the public easement.

The only plausible ground which can be taken is that which was assumed in the case of The Presbyterian Society in Waterloo *v.* The Auburn and Rochester Railroad Co. *supra*, and which has also been assumed here, namely, that to convert a highway into a railway track is no material change in, or enlargement of, that to which it was originally dedicated; that the construction of a railway along a highway is simply one of the modes of accomplishing the object of the original dedication, viz: that of creating a thoroughfare and passage-way for the public;

the remaining land, to have a railway than a common highway laid across it.

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in short, that the railway is a species of highway, and that the two uses are substantially identical.

"But is this assumption just? Are the two uses the same? If the only difference consisted in the introduction of a new motive power, it would not be material. But is there no distinction between the common rights of every man to use upon the road a conveyance of his own at will, and the right of a corporation to use its conveyances to the exclusion of all others,—between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railway company on paying their price?

"It may be said that the use of the road as a common highway is not subverted; that a man may still drive his own carriage upon it. Without pausing to notice the fallacy of this argument, and the impracticability of the enjoyment of such a right when railway trains are passing and repassing every half hour, let us look at the subject in another point of view. The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railway company, if it has a right to construct its track upon the road, also an easement? This cannot be denied; nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers and his iron rails, and make a railway upon a highway. These, then, are two easements; one vested in the public, the other in the railway company. These easements are property, and that of the railway company is valuable. How was it acquired? It has cost the company nothing.

"The theory must be that it is carved out and is a part of the public easement, and is, therefore, the gift of the public. This would do if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted?

"But it is unnecessary to refine upon this case. Any one can see, that to convert a common highway, running over a man's land, into a railway, is to impose an additional burden upon the land, and greatly to impair its value. As no compensation has, in this case, been made to the owner, his consent must in some way be shown.

"The argument is, that as he has consented to the laying out of a highway upon his land, *ergo*, he has consented to the building of a railway upon it, although one of these benefits his land, renders access to it easy, and enhances its price, while the other makes access to it both difficult and dangerous, and renders it comparatively valueless. Were the transaction between two individuals, every one would see at once the injustice of the conclusion attempted to be drawn. It is the public interest, supposed to be involved, which begets the difficulty; and it is just for this reason that the constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use without compensation; a provision no less necessary than just, and one which it is the duty of courts to see honestly and fairly enforced.

*4. If the rule of estimating damages, according to the money value of the land taken, were adopted, there would be more reason in saying the public would thereby acquire the right to

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"The case stated by the learned judge who delivered a dissenting opinion in the Supreme Court, is a striking illustration of the injustice that would frequently be done under the rule contended for by the defendants.

"A street was laid out through a man's land, and he was assessed several hundred dollars for benefits, in addition to the land taken, and before the street was opened it was taken by a railway company, and converted into the track of their road. The owner lost his land, had to pay several hundred dollars, and had the annoyance of the railway besides, while the railway company got the road for nothing.

"The case of Inhabitants of Springfield *v.* Connecticut River Railroad Co. 4 Cush. 63, shows what the Supreme Court of Massachusetts thought of the argument that the uses are the same. It was insisted there on the part of the defendants, that the power conferred upon them by the legislature to build their road between certain *termini*, gave them, by necessary implication, the right to build their track upon any intervening highway. But Chief Justice *Shaw*, in his reply to this argument, says: "The two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railway will nearly supersede the former one to which it had been legally appropriated. The whole course of legislation on the subject of railways is opposed to such a construction."

"I concur with the learned chief justice, and have no hesitation in coming to the conclusion, that the dedication of land to the use of the public as a highway is not a dedication of it to the use of a railway company; that the two uses are essentially different, and that, consequently, a railway cannot be built upon a highway without compensation to the owners of the fee. The legislative provisions on the subject were probably intended, as was intimated in The Presbyterian Society of Waterloo *v.* The Auburn and Rochester Railroad Co. *supra*, to confer the right so far only as the public easement is concerned, leaving the companies to deal with the private rights of individuals in the ordinary mode. If, however, more was intended, the provisions are clearly in conflict with the constitution, and cannot be sustained.

"It follows that the defendants in constructing their road upon Washington street, without the consent of the plaintiff, and without any appraisal of his damages, or compensation to him in any form, were guilty of an unwarrantable intrusion and trespass upon his property, and that he is entitled to relief.

"Although he had a remedy at law for the trespass, yet as the trespass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and can, of course, recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold, because, as to those lots, there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit in effect deprives the defendants of the right to have them assessed by a jury. But as this question has not been raised, it is unnecessary to consider it."

use it for any purpose of a road, which any future improvement might suggest. And this is the view which seems very extensively to prevail in this country. It was long since settled that the land-owner was not entitled to any additional damage, by reason of any alteration in the construction of the highway.[2] And the same rule has now pretty extensively been extended to improvements in erecting railways along the streets and highways.[3] These questions depend much upon the terms of the charter of the railway company.

5. And as it is confessedly competent for the legislature to require railways, in laying their track along the highways, to make compensation to the adjoining land-owners, for any increased detriment, or to be liable for all consequential damage,[4] and as it is assuredly just and equitable to do so, it seems desirable it should be done. And in those states and countries, where such enterprises have become so far matured, as to have assumed the form of a settled system, it more commonly is done. And where it is not, it may be regarded as the result of oversight, in the legislature. It was held that a railway is liable to pay damages for crossing a turnpike company's road, notwithstanding the legislature gave the right.[5]

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[2] Zimmerman *v.* The Union Canal Co. 1 Watts & Serg. 346; Mayor *v.* Randolph, 4 Watts & Serg. 514; Gov. & Co. of Plate Manufacturers *v.* Meredith, 4 Term R. 790; Sutton *v.* Clark, 7 Taunton R. 29; Boulton *v.* Crowther, 2 B. & C. 703; The King *v.* Pagham, 8 B. & C. 355; Henry *v.* The Alleghany & Pittsburgh Bridge Co. 8 Watts & Serg. R. 86; Shrunk *v.* Schuylkill Nav. Co. 14 S. & R. 71; Commonwealth *v.* Fisher, 1 Penn. R. 467; Hatch *v.* Vermont Central Railway, 25 Vt. R. 49; Taylor *v.* City of St. Louis, 14 Misso. 20; Richardson *v.* Vermont Central Railway, 25 Vt. R. 465; Callender *v.* Marsh, 1 Pick. R. 418; Rounds *v.* Mumford, 2 Rhode Island R. 154; O'Connor *v.* Pittsburgh, 18 Penn. R. 187; Plum *v.* Morris Canal & Bank. Co. and the City of Newark, 2 Stockton's Ch. R. 256.

[3] Plant *v.* Long Island Railway Co. 10 Barb. 26. But see Mifflin *v.* Harrisburg, Portsmouth, M. & L. Railway Co. 4 Harris (Penn.) R. 182. In this case the act required payment of damage to all who were injured by converting a turnpike into a railway, and it was held a receipt in full to the turnpike company did not bar the claim of an adjoining land-owner for additional damages. But the levelling of a street, preparatory to laying the structure of a railway, is not an obstruction. McLaughlin *v.* Charlotte & S. C. Railway, 5 Rich. 583; Benedict *v.* Coit, 3 Barb. 459.

[4] Bradley *v.* N. Y. & N. H. Railway Co. 21 Conn. R. 294.

[5] Seneca Railway Co. *v.* Aub. & Roch. Railway Co. 5 Hill, 170. And the amount of damage is immaterial. The maxim, *de minimis*, does not apply to cases of plain violation of right. Id. *Cowen*, J.

*6. Injunctions in equity have been denied, when applied for, to restrain railways from occupying the streets of cities and towns with their track,[6] by consent of the municipal authority.

7. But in a recent and well-considered case,[7] it was held, that

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6 Hamilton *v.* New York & Harlaem Railway, 9 Paige, 171; Hentz *v.* Long Is. Railway, 13 Barb. 646; Chapman *v.* Albany & Sch. Railway, 10 Barb. 360; Lexington & Ohio Railway *v.* Applegate, 8 Dana, 289; Drake *v.* Hudson River Railway, 7 Barb. 508; Wetmore *v.* Story, 22 Barb. 414; Milhau *v.* Sharp, 15 Barb. 193. But where the railway is constructed without the legal permission of the municipal authorities, or the legislature, along the streets of a populous city, it becomes a nuisance, and courts of equity will enjoin its continuance, at the suit of individuals who are tax-payers and property owners on the streets, through which the rails are laid. In a late case in New Jersey, Morris & Essex Railway *v.* City of Newark, 2 Stockton's Ch. R. 352, the right of a railway company to occupy the streets of a city, seems to have been examined with considerable care, by the chancellor, but the cases upon the subject are not examined very extensively, and reliance is there placed upon the case of Williamson *v.* The New York Central Railw., which has since been reversed in the Court of Appeals, *ante*, n. 1.

There is one distinction here adverted to, that is not named in other cases, so far as we have noticed, that so long as the highway or street continues to be used, as such, the concurrent use of it by a railway company for their track, by consent of the legislature and the municipal authorities, does not entitle the owner of the fee to additional compensation. But if it is appropriated exclusively to the use of the railway, the owner is then, by constitutional provision, entitled to compensation, the discontinuance of the highway causing a reverter to the owner of the fee. This qualification takes away the most offensive feature of what is claimed, in some of the cases, the right, in the legislature and the municipal authorities, to transmute a common highway or street into a public railway, as one of those improvements in the mode of intercommunication which the progress of events had brought about, and which must be regarded as fairly within the contemplation of the parties, at the time of the original taking.

But, in the present case, there being no necessity for the use of the street in question by the railway, but merely a convenience, and no express consent of the municipal authorities for such use, it was held that no right to such use could be implied from the grant of their charter, between certain termini, which might be obtained by a route less injurious to the public, and that the consent of the municipal authorities was not to be inferred from their not interfering until the track had been laid and used for several years, and large sums of money thus invested, and important interests accrued, and the injunction restraining the authorities from removing the track was dissolved.

7 Nicholson *v.* New York & New Haven Railway, 22 Conn. R. 74. If there is any departure from general principles, in this case, it is in holding the railway company justified in making alterations in highways, which cause no appreciable injury to the land-owners, and this certainly commends itself to our sense of reason and justice. It may be somewhat questionable perhaps, whether the

where a railway company, in carrying their road through the streets of the city of New Haven, found it necessary to carry one of the streets over the railway, upon a high bridge, with large embankments at each end, the plaintiff owning the land upon both sides of the street, and no compensation being assessed to him, he might recover of the company in an action of trespass, for any appreciable incidental damages, occasioned by thus constructing their road, and the consequent alteration of the highway or street. And as the company, in thus constructing their road, acted under the authority of the legislature, they were *primâ facie*, not to be regarded as trespassers, but that where they caused any appreciable damage to the land-owners along the line of the road, they were liable in this form of action. The court in this case, * *Hinman*, J., assumed the distinct ground, that the railway, by laying their track upon the plaintiff's land, which was before subject to the servitude of the highway, or street, would become liable "for such entry" upon the land. "In such case," says the learned judge, "the subjecting the plaintiff's property to an additional servitude, is an infringement of his right to it, and is, therefore, an injury and damage to him. It would be a taking of the property of the plaintiff, without first making compensation."

In a late case in Pennsylvania,[8] it is held that the legislature may authorize the construction of a railway on a street, or public highway, and the inconvenience thereby incurred by the citizens, must be borne for the sake of the public good. But where this is claimed by construction and inference, all doubts are to be solved against the company.

And where by the act of incorporation of a municipality, it

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charge of the judge, who tried the case at the circuit, was not based upon the technical rules applicable to the case, namely, that the company were, at all events, liable for nominal damages, and for all actual damages in addition. But where a railway company, by consent of the mayor and aldermen of a city, under the Revised Statutes, raise a street to enable them to carry their road under it, they become primarily liable to the adjoining land-owners, for any damage to their estates thereby. And it will not affect the liability of the company, that the city took of them a bond of indemnity, and appointed a superintendent to take care of the public interests in the execution of the work. Gardiner *v.* Boston & Worcester Railway, 9 Cush. R. 1.

[8] Commonwealth *v.* Erie & Northeast Railway, 27 Penn. R. 339. See also Alleghany *v.* Ohio & Pennsylvania Railway, 26 Penn. R. 355.

was provided, that the "streets, lanes, and alleys thereof," should forever be, and remain public highways, it was held that the municipal authorities could not authorize the construction of a railway thereon.[8]

But where the state conveys to a city, the title of a common, reserved in the grant of the township for a "common pasture," subject to the easement of the lot holders, of common of pasturage, it was held that the city might lawfully grant a portion of the same to a railway, for the purpose of constructing their road.[9]

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9 Alleghany *v.* Ohio & Pennsylvania Railway, 26 Penn. R. 355. But the grant of fifty feet, through such a common, in a densely populated city, will only convey the right to the railway to erect their road thereon, and to receive and discharge passengers and freight, and will not give the right to erect depots, car-houses, or other structures, for the convenience or business of the road; or to permit their cars and locomotives to remain on their track longer than is necessary to receive and discharge freight and passengers. Id.

And it might have been regarded as the settled doctrine of the New York courts, until the case of Williamson *v.* N. Y. Central R. *ante*, n. 1, that the owner of the fee of land dedicated to the use of a highway or street, and which the legislature devote to the use of a railway, had no claim upon the company for compensation, by reason of the additional servitude thereby imposed upon the land. Corey *v.* Buffalo, Corning & New York Railway, 23 Barb. 482; Radcliff *v.* Mayor of Brooklyn, 4 Comst. 195; Gould *v.* Hudson River Railway, 2 Seld. 522. But this is now otherwise.

And, so late as January, 1857, the subject is elaborately examined by Vice Chancellor *Kindersley*, in Thompson *v.* West Somerset Railway, 29 Law Times, 7, in relation to the *cestuis que trust* of a pier, over which the act of parliament, in express terms, authorized the company to construct their road, but which they had done without proceeding under the statutes, to appraise compensation, and the court held them trespassers, and an injunction was granted until the company made compensation.

And in a recent case in Indiana, the subject is considered, and although the authorities are not much reviewed, the conclusions of the court conform so closely to the broadest views of reason and justice, that we shall insert an extended note of the points decided.

A city ordinance authorized the construction of a railway, on either of two streets, through the corporate limits, under suitable restrictions as to grade. It was considered that the ordinance did not authorize the company to substantially alter the grade of the street. It was further:

Held, that besides the right of way, which the public have in a street, there is a private right, which passes to a purchaser of a lot upon the street, as appurtenant to it, which he holds by an implied covenant, that the street in front of his

*SECTION XV.

CONFLICTING RIGHTS IN DIFFERENT COMPANIES.

1. *Railway company subservient to another, can only take of the other, land enough for its track.*
2. *Where no apparent conflict, in route, first located, acquires superior right.*

§ 77. 1. Where the defendants' statutory powers were subject to those conferred upon the plaintiffs, whose charter was first granted, *providing that the plaintiffs' powers shall not be so exercised as to prevent the defendants from compulsorily taking and using land sufficient to construct their branch lines, not exceeding twenty-two feet in width, at the level of the rails, the plaintiffs having first purchased, with the consent of the owner, lands which the defendants proposed to take, beyond the twenty-two feet, for purposes of building stations, &c., it was held, that the plaintiffs having occupied the ground first, were entitled to

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lot shall forever be kept open, for his enjoyment, and for any obstruction thereof, to the owner's injury, he may maintain an action.

The right which the owner of a lot has to the enjoyment of an adjoining street, is part of his property, and can only be taken for public use, on just compensation being made, pursuant to the constitution. Tate *v.* Ohio & Miss. Railway, 7 Porter, (Ind.) R. 479.

And in Haynes *v.* Thomas, id. 38, where the cases are more fully examined, the same general propositions are maintained. It is there said, the right of the owner of a town lot, abutting upon a street, to use the street, is as much property as the lot itself, and the legislature has as little power to take away one as the other.

These general propositions are repeated, and somewhat varied, in the notes of this case. And although we think, upon principle, the right as against a railway company, should be placed upon the basis of it being an additional and more oppressive burden and servitude upon the land, which entitles the land-owner to additional compensation, there can be, in our judgment, no manner of question of the general soundness of the above decisions. And the latter case, being that of the voluntary dedication of property, by the owner, for the purposes of a street and highway, is very well calculated to illustrate the hardship and injustice of wresting such use to the purposes of a railway, so much more burdensome and injurious. So that the general current of the American law upon this subject may now be regarded as the same with the English rule, already stated.

hold so much as was not actually necessary for the formation of defendants' railway.[1]

2. Where two railway companies were incorporated to complete independent lines across the state, only the termini of either being prescribed, there being no apparent or necessary conflict of the routes, it was held, that the company, which first surveyed and adopted a route, and filed the survey in the proper office, were entitled to hold it, without reference to the date of the charters, both being granted at the same session of the legislature.[2]

SECTION XVI.

RIGHT TO BUILD OVER NAVIGABLE WATERS.

1. *Legislature may grant the right.*
2. *Riparian proprietor owns only to the water.*
3. *His rights in the water subservient to public use.*
4. *Legislative grant paramount, except the national rights.*
5. *State interest in flats where tide ebbs and flows.*
6. *Rights of adjoining owners in Massachusetts.*
7. *Railway grant to place of shipping.*
8. *Principal grant carries its incidents.*
9. *Grant of a harbor includes necessary erections.*
10. 11. *Large rivers held navigable in this country.*
12. *Land being cut off from wharves is "injuriously affected."*
13. *Paramount rights of Congress infringed creates a nuisance. Party specially injured may have action.*

§ 78. 1. In regard to navigable streams, it seems to be a conceded point, that the owner of land adjoining the stream, has no *property in the bed of the stream, and hence that the legislature in England may give permission to a railway company to so construct their road, as to interfere with, and alter the bed of such a stream, to the damage of any owner of adjoining land, in regard to flowage, or otherwise, even to the hinderance of accustomed navigation, without compensation; and that the railway company, in constructing their road, within the provis-

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1 Lancaster & Carlisle Railway *v.* The Maryport & Carlisle Railway, 4 Railw. C. 504; *post*, § 105.

2 Morris & Essex Railway *v.* Blair, 1 Stockton (N. J.) Ch. R. 635.

A similar decision, in principle, is made in Gawthern *v.* Stockport, Disley & W. Railway, 29 Law Times, 308, Rolls Court, March, 1857. In this case the railway, first chartered, was laid out, and partly built, but had been lying by, some time, and the Master of the Rolls held, a subsequent railway was not precluded from interfering with the contemplated route of the first railway.

ions of the act, do not become liable to an action for damages, to any such proprietor of adjoining land.[1]

2. The same point has been often decided in this country.[2] Whether waters are navigable or not, is determined, by the ebb and flow of the tide. And although streams, above that point, are navigable often, for steamboats and lesser water craft, and are public highways, for such purposes, and often become highways, by prescription, for purposes of inferior navigation, as floating timber, and wood, and possibly, they may be regarded as such even, independent of such prescription; yet the ownership of the riparian proprietor, to the middle of the stream, *ad medium filum aquæ*, is not excluded, except in tide-waters,[3] and such large rivers, in this country, as by authority of Congress, or common consent, have acquired, or assumed the character of navigable waters, although not coming strictly within the common law definition.[11]

3. But in tide-waters, and navigable lakes, the rights of the owner of land adjoining such waters, in the stream, are subservient to the public rights, and are consequently subject to legislative control, and any loss the owner of such land may thereby sustain is *damnum absque injuria*.[4]

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[1] Abraham *v.* Great Northern Railway, 5 Eng. L. & Eq. R. 258. "The legislature might authorize defendants to construct a causeway, or bridge, across navigable or tide-waters although the navigation might be thereby impaired." And in a very recent case in the Queen's Bench (Jan. 1858), Regina *v.* Musson, 30 Law Times, 272, it is held that a pier, built into the sea is not liable to the parish rates, except so far as it is above high-water mark. Lord *Campbell*, Ch. J., said, "As to the part between high and low water mark, it is quite clear that the soil between high and low water mark is in the Crown, and *primâ facie* extra parochial. If so the onus lies on the parish of showing it is within the limits of the parish. That may be done by evidence of perambulating it, in the parish bounds, or of reputation." 20 Maine R. 353; opinion of court in 31 Maine R. 9; *Shepley*, Ch. J., Rogers *v.* The Kennebec & Portland Railway, 35 Maine R. 319. So, too, to construct their road across the basins of a water company, to their injury, upon making compensation. Boston Water Power Co. *v.* Boston & Worcester Railway, 23 Pick. 360; 1 Am. Railw. C. 298.

[2] Gould *v.* Hudson River Railway, 2 Selden, 522; *post*, § 206.

[3] 1 Hargrave's Law Tracts, by Lord Hale, 12, 13, 85; Angell on Tide-Waters, c. VI. pp. 171, 172, 173, 174.

[4] Champlain & St. Lawrence Railway *v.* Valentine, 19 Barb. 484. But in Bell *v.* Gough, 3 Zab. 624, it is held, that if the riparian owner have made improvements on the land below high water, so as to have reclaimed it, the part so reclaimed belongs to him, and cannot be granted by the state. And three of the

*4. It seems to be considered, that the state legislatures have unlimited power to erect bridges and railways, and make any other public works across navigable waters, subject only to the paramount authority of the national government.[5]

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judges, in the trial of this case, in the Court of Appeals, which consisted of nine judges, held that riparian owners have a vested right in the benefits and advantages arising from their adjoining the water, of which they cannot be deprived without compensation. But this case, although exhibiting great research and ability, and considerable learning, is not altogether in accordance with the general current of the decisions upon the subject, and is probably based upon the custom, or usage, which has prevailed to a great extent in some sections of this country, from its first settlement, originally founded upon Colonial statutes probably, and in others, perhaps, growing up, by common consent, as a kind of local law.

[5] The People *v.* Rensselaer & Saratoga Railway, 15 Wend. 113; Bailey *v.* Phil. & Wil. Railway, 4 Harring. R. 389; People *v.* City of St. Louis, 5 Gilman, 351; Spooner *v.* McConnell, 1 McLean, C. C. R. 337; State of Pennsylvania *v.* Wheeling Bridge Company, 13 How. 518; Wilson *v.* The Blackbird Creek Marsh Co. 2 Pet. R. 245; Hogg *v.* The Zanesville Canal Co. 5 Ham. 410; U. S. *v.* The N. Bedford Bridge Co. 1 W. & M. 401; Atty.-Gen. *v.* Hudson River Railway, 1 Stockton, Ch. R. 526; Getty *v.* Same, 21 Barb. 617.

In the late case of Smith *v.* Maryland, 18 How. U. S. R. 71, it is held that the soil, in the shores of Chesapeake Bay, in the state of Maryland, below low water-mark, belongs to the state, subject to any prior lawful grants, by the state, or the sovereign power, before the Declaration of Independence. But that this right of soil in the state is a trust, for the enjoyment by the citizens of certain public rights, among which is the common right of fishery; that the state may lawfully regulate the exercise of this right, and declare vessels forfeit, for violations of regulations so established; and that the exercise of such powers by the state is no infringement of the paramount authority of congress, or of the exclusive admiralty and maritime jurisdiction of the United States courts.

In the case of Milnor *v.* The Railway Companies, and Others *v.* The Plank Road Companies, in New Jersey, before the Circuit Court of the United States, where it was sought to restrain the companies from bridging the Passaic River, below Newark, which had been erected into a port of entry by congress, and had some foreign commerce, and some internal navigation, the following points were ruled, by Mr. Justice *Grier*, 6 Law Reg. 6: "A court of the United States has no jurisdiction to restrain, by injunction, the erection of a bridge over a navigable river lying wholly within the limits of a particular state, where such erection is authorized by the legislature of the state, though a port of entry has been created by congress above the bridge. *Dicta*, in Devoe *v.* Penrose Ferry Bridge Co. 3 Am. L. Reg. 83, overruled; and, in Pennsylvania *v.* Wheeling Bridge Co. 13 How. 579, explained.

The point overruled by the learned judge is thus stated by him: "That although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a state, yet that as courts

5. The commonwealth of Massachusetts has no interest in flats where the tide ebbs and flows, which it is necessary to have

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of chancery they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a state." 3 Amer. Law Reg. p. 83.

The following extract from the opinion gives the point of the decision: "The Passaic River, though navigable for a few miles within the state of New Jersey, and therefore a public river, belongs wholly to that state; it is no highway to other states, no commerce passes thereon from states below the bridge to states above. Being the property of the state, and no other state having any title to interfere with her absolute dominion, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a state. Canals, turnpikes, bridges, and railways, are as necessary to the commerce between and through the several states, as rivers. Yet congress has never pretended to regulate them. When a city is made a port of entry, congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each state over her own public rivers. Congress may establish post-offices and post-roads; but this does not affect or control the absolute power of the state over its highways and bridges. If a state does not desire the accommodation of mails at certain places, and will not make roads and bridges, on which to transport them, congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry, is an act for the convenience and benefit of such place, and its commerce; but for the sake of this benefit the constitution does not require the state to surrender her control over the harbor, or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

"Whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the state of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other state. It would still be a port of entry, if congress chose to continue it so. Such action would not be in conflict with any power vested in congress. A state may, in the exercise of its reserved powers, incidentally affect subjects intrusted to congress without any necessary collision. All railways, canals, harbors, or bridges, necessarily affect the commerce not only within a state, but between the states. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a state exercised in bridging her own rivers below such port. If the power to make a town a port of entry, includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railways, and

appraised, under the statute, when such land is taken, as appur-

canals, to land as well as water? Assuming the right (which I neither affirm nor deny) of congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no act of congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being 'a good judge' could hardly be given to one who would endeavor to 'enlarge his jurisdiction' by the assumption, or rather usurpation, of such an undefined and discretionary power.

"The police power to make bridges over the public rivers is as absolutely and exclusively vested in a state as the commercial power is in congress; and no question can arise as to which is bound to give way, when exercised over the same subject-matter, till a case of actual collision occurs. This is all that was decided in the case of Wilson *v.* The Blackbird Creek, &c. 2 Peters, 257. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of any thing decided in Gibbons *v.* Ogden, or to deny the exclusive power of congress to regulate commerce. Nor does the Wheeling Bridge case at all conflict with either. The case of Wilson *v.* The Blackbird Creek, &c. governs this—while it has nothing in common with that of the Wheeling Bridge."

And where the legislature of the colony of New Jersey, at an early day, (1760,) passed an act, to enable the owners of meadows along a small creek emptying into the Delaware River, and into which the tide ordinarily flowed for about two miles, to support and maintain a dam, to shut out the tide from the creek, for the purpose of draining such meadows; and enacted that said bank, dam, and all other waterworks already erected, or which should thereafter be found necessary to be erected, for the more effectual preventing the tide from overflowing the meadows lying on the said creek, should be erected, supported, and maintained at the equal expense of all the owners and possessors of the meadows, defining the limits up the creek; and provided the manner in which the natural watercourse of the creek should be kept clear, and for the election yearly, by all the landowners, of two managers, empowered to assess the owners or occupiers of such meadows, as they should deem necessary for repairing and maintaining the dam; and the act had been accepted by the owners of the meadow, managers elected, and the dam repaired, under the provisions of the act, and a large amount expended, from time to time, after the passage of the act; and where the legislature in the year 1854 passed an act, declaring this creek to be a public highway in all respects, as fully as it was before the erection of such dam, and empowering the municipal authorities to remove the dam, and open the navigation:

It was held, upon a bill filed in equity to restrain the committee of the township from performing this duty, so imposed upon them;

That the legislature had the right to make the grant, there being nothing to show that the public interest demanded the navigation of the creek;

That it does not follow, that every creek or rivulet, into which the tide ebbs and flows, is to be regarded as navigable water, in such sense as to be beyond the control of the legislature, except as a public highway; that the legislature is

tenant to the upland, for the purpose of building a railway.[6] And as the owner has the right to raise such flats, by filling up, if he is compelled to do more filling up to secure free access to other lands, by reason of the construction of a railway, it is proper to be considered by the jury, in estimating land damages to such owners.[7] But the owner of a tide-mill has no right to have such riparian flats, as he owns, kept open and unobstructed, for the free flow of tide-water to his mill.

6. The adjoining owners of such flats in Massachusetts have the right to build solid structures to a certain extent, and thus obstruct the ebb and flow of the tide, if in so doing, they do not wholly obstruct the access of other proprietors to their houses and lands; and if the mill-owner and other proprietors suffer damage *therefrom, it is *damnum absque injuria*.[8] "Therefore," say the court, "so far as the railroad erected by the legislature affected the right of the claimants to pass and repass, to and from their lands and wharves with vessels, it was a mere regulation of

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the sole judge, to determine when such streams shall be considered navigable rivers, and be maintained and protected as such; that the act of 1760 did not only authorize the owners of the meadows to continue the dam, but it gave the authority of the state to compel its continuance; that the act of 1854 was in violation of the United States constitution, inhibiting the several states from passing laws impairing the obligation of contracts. It was a virtual repeal of the former act, under which rights had become vested, and valuable property acquired;

That the act of 1854 was also repugnant to the constitution of the state, as a taking of private property for public use, without just compensation; a partial destruction, or diminution of the value of property, being, to that extent, a taking. Glover *v.* Powell, 2 Stockton's Ch. R. 211.

[6] Walker *v.* Boston & M. Railway, 3 Cusb. 1; 1 Am. Railw. C. 462. Under a colonial ordinance, of 1647, of Massachusetts, the flats on creeks, coves, and arms of the sea, where the tide ebbs and flows, to the extent of one hundred rods, are appurtenant to the upland, and the owners of the adjoining land have an estate in fee therein, subject to the right of the commonwealth, for making public erections, which is paramount, and subject also to such restraints and limitations of the proprietors' use of them, as the legislature may see fit to impose for the preservation and protection of public and private rights. Commonwealth *v.* Alger, 7 Cush. 53. And a similar custom, or usage, prevailed to some extent, in some of the other American colonies, traces of which will be found in some of the more recent decisions in those states, which have succeeded them.

[7] Commonwealth *v.* Boston & Maine Railway, 3 Cush. 25; 1 Am. Railw. C. 482; Fitchburg Railway *v.* Boston & Maine Railway, 3 Cusb. 58; 1 Am. Railw. C. 508.

[8] Davidson *v.* Boston & M. Railway, 3 Cush. 91; 1 Am. Railw. C. 534.

a public right, and not a taking of private property for a public use, and gave no claim for damages."

7. The grant of a railway "to the place of shipping lumber" on a tide-water river, justifies an extension across flats and over tide-water to a point, at which lumber may be conveniently shipped.[9]

8. In a recent case in the House of Lords,[10] it was held, that where a statute authorizes a company to construct certain works, as a harbor, it is to be presumed they have power to execute all works incidental to their main purpose, and which they deem necessary, provided they act *bonâ fide*.

9. Accordingly when public trustees for improving the navigation of the Clyde, were authorized by statute to acquire lands adjoining the river, and to construct a quay, or harbor, and having acquired part of A.'s land, proposed to erect a large goods-shed fronting the river, and between the rest of A.'s land and the river, it was held, that although the statute gave no express power to erect sheds, it must be presumed, that a harbor, equipped with all the most approved appliances for trade, was intended by the legislature, and that therefore a power to erect sheds was implied.[10]

10. An interesting case[11] has recently been determined by the

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[9] Peavy *v.* The Calais Railway, 30 Maine, 498; 1 Am. Railw. C. 147. See also Babcock *v.* Western Railway, 9 Met. 553; 1 Am. Railw. C. 399. So the grant of a railway between certain termini, which line passes over navigable rivers, authorizes the company to bridge such rivers. Atty.-Gen. *v.* Stevens, Saxton, Ch. R. 369.

[10] Wright *v.* Scott, 34 Eng. L. & Eq. R. 1; *ante*, § 63.

[11] McManus *v.* Carmichael, 5 Law Reg. 593. It is maintained in this case, with great labor and research, that a large number of the states have adopted similar views in regard to their large rivers. See also Bowman *v.* Wathen, 2 McLean's C. C. R. 376, where the learned judge of that circuit thus lays down the law, in regard to the shores of the river Ohio: "On navigable streams the riparian right we suppose cannot extend generally beyond high water-mark. For certain purposes, such as the erection of wharves, and other structures, for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit. But in the present case this inquiry is not important. It is enough to know, that the riparian right on the Ohio River extends to the water, and that no supervening right over any part of this space can be exercised or maintained, without the consent of the proprietor. He has the right of fishery, of ferry, and every other right, which is properly appurtenant to the soil. And he holds every one of these rights by as sacred a tenure, as he

*Supreme Court of Iowa, in regard to the important question, to what extent the large rivers in this country, as the Mississippi, are to be regarded, as navigable waters, above where the tide ebbs and flows.

11. It is there held, that all waters are to be regarded, as navigable, above where the tide ebbs and flows, which are of common use to all the citizens of the republic for purposes of navigation, or that navigability, in fact, is to be regarded, as the decisive test, rather than the ebb and flow of the tide. And it is here maintained, that the acts and declarations of the United States constitute the Mississippi a public highway, and that consequently the riparian proprietors have no interest in the lands below high-water mark.

12. And where one upon the shore of a navigable stream, or arm of the sea, is cut off by a railway, or other public work, from all communication with the navigation, to the injury of wharves or other erections, which the party made upon his land, it has been held that such person is entitled to damages under the statutes allowing parties compensation, where their estate is "injuriously affected." [12]

13. And it seems to be regarded, as settled, that where the grant of any authority, by the state legislature, in regard to navigable waters, in its exercise, works an interference with the exclusive power of Congress, to regulate commerce, whether foreign, or internal, such interference, being unlawful, is a nuisance, and any private person, suffering special damage thereby, is entitled to an action at law, or to maintain a bill in equity, for a perpetual injunction.[13]

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holds the land, from which they emanate. The state cannot, either directly or indirectly, divest him of any one of these rights, except by a constitutional exercise of the power to appropriate private property, for public purposes. And any act of the state, short of such an appropriation, which attempts to transfer any of these rights to another, without the consent of the proprietor, is inoperative." See also Lehigh Valley Railw. *v.* Trone, 28 Penn. R. 206.

[12] Bell *v.* Hull & Selby Railway, 6 M. & W. 699.

[13] State of Pennsylvania *v.* Wheeling Bridge Co. 13 How. R. 518; s. c. 18 id. 421. The same principle is recognized in other cases. Works *v.* Junction Railway, 5 McLean R. 425; United States *v.* Railroad Bridge Co. 6 id. 517.

When the case of Pennsylvania *v.* Wheeling Bridge Co. was last before the court, it was held, that the paramount authority of Congress, in the regulation of commerce, included the power to determine, what was an obstruction to navi-

*SECTION XVII.

OBSTRUCTION OF STREAMS BY COMPANY'S WORKS.

1. *Cannot divert stream, without compensation.*
2. *Company liable for defective construction.*
3. *So also if they use defective works, built by others.*
4. *Company liable to action, where mandamus will not lie.*
5. *Company liable for defective works, done according to their plans.*
6. *When a railway "cuts off" wharves from the navigation.*

§ 79. 1. In regard to the obstruction of streams, by building railways, the better opinion seems to be, that the company are bound to do as little damage to riparian proprietors, as is reasonably consistent with the enjoyment of their grant.[1] The state cannot grant the power to divert a stream of water, without compensation.[2]

2. Thus if by making needless obstructions in streams, in the erection of bridges, or by imperfect or insufficient sluices, or ducts, for the passage of streams, intersected by a railway, the land of adjoining proprietors is injured, the company are liable.[3]

3. So too the company are liable to damages, for an injury, caused to the plaintiff, by flowing his land, in a great freshet, in

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gation. And Congress having legalized the bridge of defendants, after the judgment of the court to abate it, but before it was carried into effect, it was held, that the occasion for executing the judgment was thereby removed. Mr. Justice *Nelson*, p. 432, thus lays down the law, as to streams under state control:—

"The purely internal streams of a state, which are navigable, belong to the riparian owners to the thread of the stream," and they have a right to use them, "subject to the public right of navigation." "They may construct wharves or dams or canals, for the purpose of subjecting the stream to the various uses, to which it may be applied, subject to this public easement. But if these structures materially interfere with the public right, the obstruction may be removed, or abated, as a public nuisance."—"These purely internal streams of a state, as to the public right of navigation, are exclusively under the control of the state legislature." And although erections authorized by grant from the state legislature cause "real impediment to the navigation," they are nevertheless lawful, and the riparian owner has no redress. See also Morgan *v.* King, 18 Barb. 277.

[1] Boughton *v.* Carter, 18 Johns. R. 405; Hooker *v.* N. H. & Northampton Co. 14 Conn. 146.

[2] Gardner *v.* Newburgh, 2 Johns. Ch. R. 162.

[3] Hatch *v.* Vermont Central Railway, 25 Vt. R. 49 *seq.*; Mellen *v.* Western Railway, 4 Gray, 301; March *v.* C. & P. Railway, 19 N. H. 372.

consequence of their bridges damming up the water, although the bridges were erected by another company, before the defendants' *company was chartered,[4] and there had been no request to the defendants to remove the obstruction.[5]

4. And where the waters, on certain lowlands, were flowed back upon the plaintiff's land, by reason of insufficient openings in a railway constructed across such lowlands, it was held, that the company were liable to make good the damages sustained by plaintiff, although no statute required them to make the openings, and they could not be compelled to do so by writ of mandamus.[6] So too in regard to other public works, if damage accrue to others, in consequence of their imperfect construction, the proprietors are liable, as a municipal corporation, for insufficient sewers, whereby plaintiff's factory was overflowed, in a freshet, and the property therein seriously injured.[7]

5. In a late case, where the plaintiff's garden was overflowed, by the manner in which an excavation was made, in the course of construction of a railway across a road, or highway, by carelessly cutting into a drain, or culvert, and letting out the water,[8] it seems to have been admitted, on all hands, that the company would have been liable for the injury, if it had been done by persons under their control, or in accordance with the directions of their surveyor or engineers.[8]

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[4] Brown *v.* Cayuga & Susquehannah Railway, 2 Kern. 486.

[5] Per *Denio*, J., 2 Kern. 486. But the question in regard to the liability of the company, for continuing the obstruction, without notice to remove it, was not decided by the court. This subject, in regard to the necessity of a special request, is somewhat discussed in Norton *v.* Valentine, 14 Vt. R. 244. In Hubbard *v.* Russell, 24 Barb. R. 404, it is held, that in order to recover damages of the "continuator of a private nuisance, originally erected by another," there must be proof of a request to remove the same. But where a railway company bought up a navigation company, and suffered the works of that company to fall to decay, so that damage was suffered by a municipal corporation, in regard to their harbor, it was held the company were liable; although only a nonfeasance in form it operated substantially as a misfeasance, they having maintained and used the locks of the navigation company in such a state as to cause the injury. Preston *v.* Eastern Counties Railw. 30 Law Times, 288.

[6] Lawrence *v.* Great Northern Railway, 4 Eng. L. & Eq. R. 265; s. c. 16 Q. B. 643, and 6 Railw. C. 656.

[7] Rochester White Lead Co. *v.* The City of Rochester, 3 Comst. 463. See also Radcliff *v.* Brooklyn, 4 Comst. 195; Mayor of New York *v.* Furze, 3 Hill, 612; Bailey *v.* Mayor of New York, 3 Hill, 531.

[8] Steel *v.* Southwestern Railway, 32 Eng. L. & Eq. R. 366. See § 168, *post*,

6. And where the plaintiff owns a dock on the east side of Hudson River, on the margin of a bay, under a charter from the state, in 1849, and the Hudson River Railway, in pursuance of its charter, granted in 1846, constructed their road across the bay, on piles, about nineteen hundred feet west of the dock, with a drawbridge sufficient to allow a passage to such vessels as had before navigated the bay, the charter of the railway containing a *provision, that if any dock shall be "cut off" by the railway, the company shall extend the same to their road, it was held that this dock was not "cut off," within the meaning of the provision.[9]

SECTION XVIII.

OBSTRUCTION OF PRIVATE WAYS.

1. *Obstruction of private way matter of fact, need not be illegal.*
2. *Farm road, on one's own land, not private way.*
3. *But railway may lawfully pass along public street.*

§ 80. 1. Where the statute gives a right of action against the company, when in the construction, or management of their road, they shall obstruct the safe and convenient use of a private way, it was held not necessary to the maintenance of the action, that the railway should be constructed, or managed, in an illegal or improper manner.[1] But if the railway be shown to have been constructed and managed in a proper manner, and a passage over the railway provided for the private way, the court cannot decide as matter of law, whether the safe and convenient use of the way is obstructed or not. That is a question of fact to be settled by the jury.[2]

2. But a farm road, which the owner of the land has constructed for the convenient use of his farm, is not to be regarded as a private way, within the meaning of a railway act.[3] A pri-

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for a full statement of this case. But there is no liability incurred towards a mill-owner below, by cutting off springs, in sinking wells upon one's own land. Chasemore *v.* Richards, 29 Law Times, 230.

9 Tillotson *v.* Hudson River Railway, 15 Barb. 406.

1 Concord Railway *v.* Greely, 3 Foster, R. 237.

2 Greenwood *v.* Wilton Railway, 3 Foster, R. 261.

3 Clark *v.* The Boston, Concord, & Montreal Railway, 4 Foster, 114.

vate way, within the construction of the railway acts, is a way, or right of way, which one man has in the land of another.[4]

3. But it has been held,[5] that, where the plaintiff's right of way, *in another's land, was obstructed by the passage of a railway, through the streets of a town, in accordance with their charter, no action for damages could be maintained, and that the party could have no redress, unless his case came within the provisions of the statute allowing compensation.

SECTION XIX.

STATUTE REMEDY EXCLUSIVE.

1. *Remedy for land taken, exclusively under the statute.*
2. *But if company do not pursue statute are liable as trespassers. Liable for negligence also.*
3. *Courts of equity often interfere by injunction.*

§ 81. 1. It seems to be well settled, notwithstanding some exceptional cases, that the remedy given by statute to land-owners for injuries sustained, by taking land for railways, is exclusive of all other remedies, and not merely cumulative.[1]

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[4] Bliss *v.* Passumpsic River Railway, Vermont Sup. Court, not reported.

[5] McLaughlin *v.* Charlotte & S. C. Railway, 5 Rich. 583. But this decision seems to rest upon the peculiar views of this state upon that subject, that it is lawful to take private property for public use, without compensation, their state constitution containing no provision upon the subject. But the reported cases in this state, from the first, Dun *v.* City Council of Charleston, 1 Harper, R. 189 (1824), manifest a scrupulous regard to the rights of property owners, when attempted to be interfered with, for other than strictly public purposes. And we are not aware that practically, and as a general thing, the legislature of this state have exercised the theoretical right which it possesses, of taking private property for public use without compensation. We believe that is not the fact.

[1] East and West India Dock & Birmingham Junction Railway Co. *v.* Gattke, 3 Eng. L. & Eq. R. 59; Watkins *v.* Great Northern Railway Co 6 id. 179; Kimble *v.* White Water Valley Canal, 1 Carter R. 285; Knorr *v.* Germantown Railway Co. 5 Wharton, 256; Mason *v.* Kennebec & P. Railway Co. 31 Maine R. 215; 1 Am. Railw. C. 62. But in Carr *v.* The Georgia Railway & Banking Co. 1 Kelly, 524, it was held, the statute remedy was not exclusive, but merely cumulative. This case professes to go upon the authority of Crittenden *v.* Wilson, 5 Cowen, 165, where it was held, that the party whose lands had been overflowed, by means of a dam erected by the authority of the legislature, which contained a provision for estimating damages, to land-owners injured thereby,—might maintain an action, as at common law. These decisions, go upon the principle, found

*2. But if the railway company have assumed to appropriate the land, in violation of the provisions of the statute to be complied with on their part, their acts are ordinarily to be regarded as trespasses; and when they have acquired the right to the use of the land, but have omitted some duty imposed by the statute, or where they have been guilty of negligence, or want of skill, in the exercise of their legal rights, they make themselves liable to an action upon the case at common law.[2]

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in some of the elementary books, that a statutory remedy for what was actionable at common law, is *primâ facie* to be regarded as cumulative merely. It seems now to be the generally received opinion upon this subject, that the statutory remedy, being more ample, and more specific, is ordinarily to be regarded as exclusive. But the settled difference of opinion, among the judges of the Queen's Bench upon the subject, in Kennett Nav. Co. *v.* Withington, 11 Eng. L. & Eq. R. 472, shows that the matter is not quite settled in that country.

The learned editors of the American Railway Cases have an able and very satisfactory note upon this subject, in which most of the authorities bearing upon the point are thoroughly revised. 1 Am. Railw. C. 166, 167, 168, 169, 170, 171.

In Aldrich *v.* The Cheshire Railway, 1 Foster, 359; s. c. 1 Am. Railw. C. 206, it is held, that the statute remedy is exclusive of all others. So also in Troy *v.* The Cheshire Railway, 3 Foster, 83, it is held that the statute remedy must be followed, as far as it extends, but if it only extend to part of the injury occasioned, the party may have his action at common law for the residue.

But where a railway company are ordered to make and maintain a private way, for the benefit of a party, and fail to comply, the appropriate remedy is the one pointed out in the statute. White *v.* Boston & Prov. Railway, 6 Cush. 420. And where the statute provides no specific remedy, in such a case, an action on the case will lie probably upon general principles.

But in a late English case, Ambergate, Nott. & Boston & E. J. Railway *v.* Midland Railway, 22 Eng. L. & Eq. R. 289, where the statute gives a penalty for one company running its engines upon the track of another company, without first having obtained the requisite certificate of approval of the engines by the second company, it was held, that this did not take away the common-law right of seizing the engines, while upon their track, damage feasant. And that having made the distress, upon the engine, while so unlawfully on their track, and the first company having demanded its surrender, after it had been removed off the defendants' line, with the declared purpose of using it again, in the same way; that such demand was illegal, and the defendants justified in not acceding to it. See also, in confirmation of the general proposition of the text, New Albany & Salem Railway *v.* Connelly, 7 Porter (Ind.) R. 32; Leviston *v.* Junction Railway, id. 597; Lebanon *v.* Olcott, 1 N. H. 339. Victory *v.* Fitzpatrick, 8 Ind. R. 281.

2 Watkins *v.* Great Northern Railway Co. 6 Eng. L. & Eq. R. 179; Dean *v.* Sullivan Railway Co. 2 Foster, R. 316; 1 Am. Railw. C. 214; Mayor of Lichfield *v.* Simpson, 8 Ad. & Ellis (N. S.) 65; Furniss *v.* Hudson River Railway Co. 5 Sand. S. C. R. 551; Turner *v.* Shef. & Rotherham Railway, 10 M. & W. 425.

3. And the courts of equity will in many cases interfere by injunction, where railway companies are proceeding to take land contrary to the provisions of the act of parliament.[3]

*SECTION XX.

LANDS INJURIOUSLY AFFECTED.

1. *Obstruction of way, loss of custom.*
2. *Equity will not enjoin legal right.*
3. *Liable for building railway, so as to cut off wharf.*
4. *Not liable for crossing highway on level.*
5. *English statute only includes damages, by construction.*
6. *Equity will not enjoin even a doubtful claim.*
7. *Damages unforeseen, at the time of the appraisal, may be recovered, in England.*
8. *Injuries to ferry, and towing-path, compensated.*
9. 10. *Remote injuries not within the statute.*
11. *Damages compensated, under statute of Massachusetts.*
12. *Damages not compensated, as being too remote.*
13. *For negligence in construction, remedy at common law.*

§ 82. 1. The right of a party to claim consequential damages, where his land was not taken, but only injuriously affected, was

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In this last case, the injury complained of was, the obstruction of ancient lights, by the erection of the company's station-house, done under the act; and the dust, &c., drifted from the station-house and embankment into the plaintiff's house. The plaintiff's house not being upon the schedule attached to the bill, the company had no right under the act to take it, or injuriously to affect it. So that the parties stood as at common law. See also Shand *v.* Henderson, 2 Dowl. P. C. 519; Davis *v.* London & Blackwall Railway, 2 Railw. C. 308.

[3] Stone *v.* Commercial Railway, 1 Railw. C. 375; Lord Chancellor in Manser *v.* N. & E. Railway Co. 2 Railw. C. 380, 391; Priestly *v.* Manchester & L. Railway Co. 2 Railw. C. 134; London & Birmingham Railway Co. *v.* Grand Junction Canal Co. 1 Railw. C. 224. In this case, as well as the next preceding, it is said the company is to be the judge of the most feasible mode of carrying forward its own operations, and is not liable to be called to account for the exercise of this discretion, so long as they act *bonâ fide*, and with common prudence.

But it affords no just ground of equitable interference, that the special tribunal provided by statute, to have exclusive jurisdiction of certain claims, is altogether incompetent to decide such questions as naturally arise. If any such defect exists, the legislature alone can afford redress. Barnsley Canal Co. *v.* Twibill, 3 Railw. C. 471.

Nor is the land-owner entitled to maintain a common-law action, because he refused to join in the proceedings under the statute, the company having proceeded *ex parte*, and caused an appraisal, and deposited the sum awarded for compensation. Hueston *v.* Eaton & H. Railway, 4 Ohio St. R. 685.

very thoroughly discussed by Lord *Truro*, Chancellor, in a late case,[1] where the defendant, a furrier, claimed damage, in consequence of the dust and dirt, occasioned by the company, having injured his goods, and that his customers had been compelled, by the obstruction caused by the company's works, to quit the side of the road upon which the defendant's shop was situated, before they arrived at that point, and cross the street to get along, by reason whereof he had lost custom. The defendant also claimed that the company had obstructed a passage to his buildings, by which he had an entrance to the back part of his premises.

*2. This was an application, by the company, for an injunction to restrain the party from proceeding under the statute, and the court held, that as the party had a clear legal right, under the act of parliament, they could not be deprived of pursuing it, in the mode pointed out, and fully affirmed the views of Lord *Denman*, Ch. J., in Regina *v.* Eastern Counties Railway Company,[2] where the damage claimed was by lowering a road upon which the land abutted, so as to impede the entrance to the land, and compel the owner to build new fences.

3. The construction of a railway across flats, in front of plaintiff's wharf, gives him a right to damage under the statute of Massachusetts, although the wharf itself remain uninjured.[3] But the charter of a railway company having authorized them to make certain specified erections, between the channels of two rivers, and such erections having so changed the currents of the

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[1] East & W. I. Docks & Birmingham Junction Railway Co. *v.* Gattke, 3 Eng. L. & Eq. R. 59.

[2] 2 Ad. & Ellis (N. S.) 347. See *post*, Appendix B. § 99. In this case the court held that the injuries complained of, clearly came within the act, and Lord *Denman*, in closing his opinion, makes a very significant reply to a class of arguments, not uncommon upon all subjects. "Before we conclude, we shall briefly advert to an argument much pressed upon us; that if we make this rule absolute, *any* injury to land, at any distance from the line of railway, may become the subject of compensation. If extreme cases should arise, we shall know how to deal with them; but in the present instance, the alleged injury is to land adjoining a road, which has been 'lowered' under the provisions of the act, and which is therefore land *injuriously affected*, by an act expressly within the powers conferred by the company."

[3] Ashby *v.* The Eastern Railway Co. 5 Met. R. 368; 1 Am. Railway C. 356. And in Bell *v.* The Hull & Selby Railway, 2 Railw. C. 279, a similar decision is made under the English statute.

rivers, as to render more sea-wall necessary to secure certain wharves and flats, in the vicinity, it was held that the damage thereby occasioned was *damnum absque injuria.*[4]

4. One cannot claim damage of a railway company, by reason of their track crossing a public highway, near his dwelling, upon a level, the highway being the principal approach to his grounds.[5]

5. In a recent English case,[6] it is held that the English statute, giving compensation, where lands are injuriously affected, was intended to include only such damages as were caused by the erection of the company's works, and not such, as might in future * be caused by the use of the works, this being the case of Gas Works, and the 68th section of the Lands Clauses Acts being made a part of the company's special act. But this certainly could not extend to the ordinary use of a railway, which is the only, or the principal mode of injuriously affecting lands not taken, and which could be as strictly estimated, at the time of the company's works being erected, as from time to time thereafter.

6. In a recent case,[7] where the lessee of an inn and premises, situated near a tunnel on the company's road, claimed damages, because the vibration, caused by the trains, prevented him keeping his beer in the cellar, in a fit state for his customers, and the value of the house was thereby lessened, being rendered unfit for a public-house; and the plaintiffs moved for an injunction to restrain the defendant from proceeding to assess damages under the statute; the Lord Chancellor denied the motion, upon the ground, that the remedy at law was altogether adequate. But his lordship intimated a very decided opinion, that no such damages could be recovered. He says, "Whether an action will lie on behalf of a man, who sustains a private injury, by the exercise of parliamentary powers, done judiciously and cautiously, is not an easy question, or rather it is not easy to come to the conclusion, that an action will lie. I entertain a decided opinion, (probably however erroneous,) that no such action will lie."[8]

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[4] Fitchburg Railway *v.* Boston & Maine Railway, 3 Cush. 58; 1 Am. Railw. C. 508; *ante*, § 75.

[5] Caledonian Railway *v.* Ogilvy, 29 Eng. L. & Eq. R. 22.

[6] Law Times, February, 1857, p. 329, not yet reported in this country.

[7] The London & N. W. Railway Co. *v.* Bradley, 6 Railw. C. 551.

[8] Hatch *v.* Vermont Central Railway Co. 25 Vt. R. 49.

7. And where the plaintiff's damages for land taken by the company, and by severance, and otherwise, were determined, by an arbitrator,[9] but from the road being built across certain flats, with insufficient openings, the waters became dammed up, and injured the plaintiff's remaining lands, it was held, he was entitled to recover "*as for an unforeseen injury, arising from the manner in which the railway was constructed.*" But it is here said, "The *company might, by erecting their works with proper caution, have avoided the injury." It seems this is the only ground of an action.

8. In a doubtful case the court issued an alternative mandamus and required a return of the facts.[10] So too a party, whose ferry has been materially lessened in value, by obstructing access to it, may recover damages of the company under the statute.[11] So, too, if a towing-path be obstructed, or the navigation diverted from it, the owner, under a similar statute, may have compensation.[12]

9. Some questions under this head have arisen, in regard to mines and minerals, not of sufficient importance to be stated in detail.[13] Where the damage resulted from the company turning a brook, the court ordered a mandamus.[14] But brewers, ac-

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[9] Lawrence *v.* Great N. Railway Co. 6 Railw. C. 656; 4 Eng. L. & Eq. R. 265; *ante*, § 79, n. 6; § 74, n. 7; L. & Y. Railway *v.* Evans, 19 Eng. L. & Eq. R. 295. Under most of the American statutes, the damages, as well prospective as present, must be assessed at once, and no recovery can be had for unforeseen injury, more than in any case of a recovery of damages for a tort. But in the case of Lancashire & Y. Railway *v.* Evans, it is obvious from the elaborate review of the case, by the Master of the Rolls, that the English courts now regard the land-owner as entitled to make new claims, from time to time, as they occur, for any injurious consequence of the construction of the works. For any unlawful act, in the construction or use of the works, an action at common law is the proper remedy.

[10] Queen *v.* The North Union Railway Co. 1 Railw. C. 729.

[11] *In re* Cooling, 19 Law J. Q. B. 25; s. c. Hodges on Railways, 277. It is said here, that a ferry is different from a public-house, whose custom is said to be injured by obstructing the travel and access to the house, by cutting through thoroughfares leading to it, which, it has been held, is no ground of claiming damage under a similar statute. The King *v.* The London Dock Co. 5 Ad. & Ell. 163.

[12] The King *v.* Commis. of Thames & Isis, 5 Ad. & Ell. 804.

[13] Fenton *v.* Trent & Mersey Nav. Co. 9 M. & W. 203; Cromford Canal Co. *v.* Cutts, 5 Railw. C. 442; The King *v.* Leeds & Selby Railway Co. 3 Ad. & Ell. 683.

[14] Reg. *v.* North Midland Railway Co. 2 Railw. C. 1.

customed to take water from a public river, are not entitled to receive compensation, when the waters were deteriorated by the works of a dock company.[15]

10. It was held that a tithe-owner is not entitled to compensation, unless the act contain an indemnity, in his favor.[16] The interest of a tithe-owner is too remote and incidental, to be the subject of general indemnity. It often forms the basis of special statutory provisions for indemnity.

11. In a recent well-considered case, the rule, in regard to what damage is to be included under the terms, "lands injuriously affected," or equivalent terms, is thus laid down: "All direct * damage to real estate, by passing over it, or part of it; or which affects the estate directly, although it does not pass over it, as by a deep cut, or high embankment, so near lands or buildings, as to prevent or diminish the use of them; by endangering the fall of buildings, the caving of earth, the draining of wells, the diversion of watercourses," by the proper erection and maintenance of the company's works. "Also as being of like character, blasting a ledge of rocks, so near houses or buildings as to cause damage; running a track so near, as to cause imminent and appreciable danger by fire; obliterating or obstructing private ways leading to houses or buildings,"—all these and some others, doubtless, are included.

12. "But that no damage can be assessed for losses arising directly, or indirectly, from the diversion of travel, the loss of custom to turnpikes, canals, bridges, taverns, coach companies, and the like; nor for the inconveniences which the community may suffer in common, from a somewhat less convenient and beneficial use of public and private ways, from the rapid and dangerous crossings of the public highways, arising from the usual and ordinary action of railroads, and railroad trains, and their natural incidents."[17]

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[15] The King *v.* Bristol Dock Co. 12 East, 429.

[16] Reg. *v.* The Commissioners of Nene Outfall, 9 B. & C. 875; London & Blackwall Railway Co. *v.* Letts, 3 H. L. Cases, 470; Hodges on Railways, 289, n. *(m)*; 8 Eng. L. & Eq. R. 1.

[17] Proprietors of Locks & Canals *v.* Nashua & Lowell Railway, 10 Cush. R. 385. *Shaw*, Ch. J. (391, 392.) Nor is the party, whose lands lie near a railway line, entitled to compensation, for being injuriously affected, by persons in the trains overlooking the grounds, thus rendering them less comfortable and secluded, for

13. It is held also in this case, that no damages can be assessed under the statute, for cutting through a watercourse, in making an embankment, without making a culvert, whereby the water is made to flow back, and injure the plaintiff's land, at a distance from the railway, no part of which is taken, the remedy being by action, at common law.[17]

*SECTION XXI.

DIFFERENT ESTATES PROTECTED.

1. *Tenant's good-will and chance of renewal protected.*
2. *Tenants entitled to compensation for change of location.*
3. *Church property in England, how estimated.*
4. *Tenant not entitled to sue, as owner of private way.*
5. *Heir should sue for compensation.*
6. *Lessor and lessee both entitled to compensation.*
7. *Right of way, from necessity, protected.*
8. *Mill-owner entitled to action for obstructing water.*
9. *Occupier of land entitled to compensation.*
10. *Tenant, without power of alienation, forfeits his estate, by license to company.*

§ 83. 1. The English statute provides for the protection of the interests of lessees in certain cases.[1] And lessees from year to year have recovered, for the good-will of the premises, which would have been valuable as between the tenant and a purchaser, although it was not a legal interest as against the landlord.[2] But not when the tenancy was from year to year, determinable at three months' notice, with a stipulation against underletting without leave.[2] So too an under-tenant is entitled to compensation for good-will.[3] But in a lease for fourteen years, with covenant to yield up the premises, at the end of the term, with all fixtures and improvements, where the company suffered the lease to expire and then turned out the tenant, held, that he was enti-

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the walks of the family, and visitors. Nor can the party claim compensation for vibration of the ground, caused by the use of the road, the statute only extending to damages, caused by the *construction* of the works. Reg. *v.* Southeastern Railway, 29 Law Times, 124.

1 8 & 9 Vict. c. 18, § 119 to 122, and 8 & 9 Vict. c. 20, § 43.

2 *Ex parte* Farlow, 2 B. & Ad. 341; The Matter of Palmer *v.* Hungerford Market, 9 Ad. & Ellis, 463.

3 Rex *v.* The Hungerford Market, 4 B. & Ad. 592.

tled to compensation for good-will and the chance of beneficial renewal, but not for improvements, but nevertheless these might be considered, by the jury, in estimating the chance of beneficial renewal.[4]

2. The loss which a brewer sustained, by having to give up his business, till he could procure other premises, suitable for carrying it on, was held a proper subject of compensation under a similar statute.[5] Where the act required tenants from year to year, to give up premises to the company, upon six months' notice to quit, *without reference to the time when their term began, but allowed them compensation, if required to leave before their term expired, it was held, that when the six months' notice required the tenant to leave at the end of his term, he was not entitled to compensation.[6] But where a tenant gives up premises under a six months' notice, from a railway company, when he is entitled to compensation, without demanding it of the company, he is still bound to pay full rent to his landlord.[7]

3. Church property, in England, is estimated with reference to the cost of a new site and similar erections, to be fixed, by agreement, between the company and the diocesan and archbishop of the province. But after this appropriation of the site of a church to secular purposes, the rector is entitled to have his interest in the premises connected therewith, estimated, at its value for secular uses.[8]

4. Where the charter of a company imposed a penalty upon them, for any obstruction or interruption of a road, and in the case of a private road gave the right to recover the penalty to the owner of the road, it was held, that the tenant of the farm over which the road passed, could not sue for the penalty.[9]

5. Where land of a deceased person is taken for a railway, the heir, and not the administrator, is entitled to the damages, for

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[4] Rex *v.* The Hungerford Market, 4 B. & Ad. 596. But the case of Rex *v.* Liv. & Manchester Railway, 4 Ad. & Ellis, 650, seems to treat a similar estate, as absolutely gone, at the end of the term, and the company bound to make no compensation.

[5] Jubb *v.* Hull Dock Co. 9 Ad. & Ellis (N. S.) Q. B. R. 443.

[6] The Queen *v.* London & Southampton Railway Co. 1 Railw. C. 717.

[7] Wainwright *v.* Ramsden, 1 Railw. C. 714.

[8] Hilcoat *v.* The Archbishops of Canterbury & York, 10 C. B. R. 327.

[9] Collinson *v.* Newcastle & Darlington Railway, 1 Car. & Kir. 546.

such taking, and to prosecute for the recovery thereof, although the administrator had previously represented the estate insolvent, and afterwards obtained a license to sell the real estate for the payment of debts.[10]

6. And a tenant, whose lease began before, and who was in possession at the time an injury was done, is entitled to recover damages for an injury sustained by him, in building a turnpike road.[11] But the lessor and lessee are each entitled to recover compensation for the damage sustained by them respectively.[12]

7. And where the plaintiff had no access to his land except over the land of his grantor, it was held, that he had a way, by necessity, across such land, and that he was entitled to maintain an action against a railway company for obstructing it.[13]

8. So also where the free flow of water from a saw-mill is obstructed, by the erection of a railway bridge below the mill, the company are liable to the owner of the mill in an action of tort.[14] But they are not liable for any increased expense thereby occasioned to the mill-owner, in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts, or not.[14]

9. Where the statute gives remedy against all persons interested, the occupant of land is liable to be affected by the proceedings, and a similar construction will prevail where the remedy is given to all interested.[15]

10. And where a tenant, who held the land for a term of years, with a strict clause against alienation or subletting, assigned a small portion to a railway, for a temporary purpose, the company not dealing with the landlord, or giving him any compensation for the use of the land, it was held, that he was entitled to maintain ejectment against the company, and his tenant, for the forfeiture incurred by this subletting.[16]

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[10] Boynton *v.* Peterboro & Shirley Railway, 4 Cush. R. 467.

[11] Turnpike Road *v.* Brosi, 22 Penn. R. 29.

[12] Parks *v.* City of Boston, 15 Pick. 198.

[13] Kimball *v.* The Cocheco Railway, 7 Fost. R. 448.

[14] Blood *v.* Nashua & Lowell Railway, 2 Gray, 137.

[15] Gilbert *v.* Havermeyer, 2 Sand. 506. The term owner in a statute requiring compensation by railway companies for land taken by them, includes every person having any title to or interest in the land, capable of being injured by the construction of the road, and extends to the interest of a lessee or termor. Balt. & Ohio Railw. *v.* Thompson, 10 Md. R. 76.

[16] Legg *v.* Belfast & Bellamy Railway, 1 Irish Law R. (N. S.) 124, n.

SECTION XXII.

ARBITRATION.

1. *Attorney, without express power, may refer disputed claim.*
2. *Award binding, unless objected to in court.*

§ 84. 1. It was held that an attorney, who had no authority under seal, either to defend or refer suits, might nevertheless make a valid reference of a disputed claim against the company, under a judge's order.[1]

*2. And if the company objected that the arbitrator awarded upon matters not submitted, he should have applied to the court, to revoke the submission, or set aside the award, upon its return into court; but not having done so, the claim being set up and entertained by the arbitrator, the award is binding.[1] The same principles would probably obtain in the American courts.

SECTION XXIII.

STATUTE OF LIMITATIONS.

1. *General limitation of actions, applies to land claim.*
2. *Filing petition will not save bar.*

§ 85. 1. Where neither the general statutes, or the special act, contain any specific limitation, in regard to claims, upon railway companies, for land damages, it has been held that the general statute of limitation of actions, for claims of a similar character, will apply. And where the claim was for an injury to an island, caused by the erection of a railway bridge, and to the award of the viewers, the company plead *actio non infra sex annos*, the plea was held good.[1]

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[1] Faviell *v.* The Eastern Counties Railway, 2 Exch. R. 344. It is held generally in the English courts, that an attorney should be appointed under seal to prosecute and defend suits, on the part of corporations. Thames Haven Dock & Railway Co *v.* Hall, 5 Man. & G. 274; Arnold *v.* The Mayor of Poole, 4 id. 860.

But when by the incorporation of a railway company, the directors were empowered to appoint, and displace any of the officers of the company, the appointment of an attorney, by the company, need not be under seal. See *post*, § 182.

[1] Forster *v.* The Cumberland Valley Railway, 23 Penn. R. 371.

2. And where the statute provides, that no process, to recover compensation for land or property taken by a railway, shall "be sustained, unless made within three years from the time of taking the same," a mere filing of an application with the clerk of the county commissioners, without bringing it to the notice of the commissioners, or any action of theirs thereon until the three years have elapsed, will not save the bar of the statute.[2]

The land-owner may also traverse the right of the company to take the land either originally, for the location and construction of their road, on the ground that it does not come within their line, or the line of deviation from the prescribed route, or that they have not taken the proper preliminary steps, or for any other cause; or *when the company propose to change their route, or to enlarge their accommodation works, on the ground of having made their exclusive election in one case, or the want of necessity in the other.[3]

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*CHAPTER XII.

REMEDIES BY LAND-OWNERS UNDER THE ENGLISH STATUTE.

CHAPTER XIII.

ENTRY UPON LAND, BEFORE COMPENSATION IS ASSESSED, UNDER THE ENGLISH STATUTE.

CHAPTER XIV.

THE MODE OF ESTIMATING COMPENSATION UNDER THE ENGLISH STATUTE.

[For these three chapters, § 86–104, which contain the proceedings under the English statute, with the decisions in regard to them, and occasional references to the decisions of the American courts, upon analogous provisions, see Appendix, B.]

2 Charles River Railway *v.* County Commissioners of Norfolk, 5 Gray.

3 South Carolina Railway *v.* Blake, 9 Rich. 228; *ante*, § 72; *post*, § 105, n. 14.

*CHAPTER XV.

CONSTRUCTION OF RAILWAYS.

SECTION I.

LINE OF RAILWAY. RIGHT OF DEVIATION.

1. *Manner of defining the route in English charters.*
2. *Question involved stated.*
3. *Plans only binding, when and for the purpose referred to, in the act.*
4. *Contractor bound by deviation, unless he object.*
5. *Courts of equity will not enforce contract against public security.*
6. *Right to construct accessory works.*
7. 8. *Company may take lands designated, in their discretion.*
9. *Equity cannot enforce contract, not incorporated into the act.*
10. *Right of deviation lost by election.*
11. *Railway between two towns, extent of grant.*
12. *Grant of land for railway, includes accessories.*
13. *Route designated need not be followed literally.*
14. *Terminus being a town, is not extended, as the town extends.*

§ 105. 1. The English railway acts are granted altogether, after full surveys of the route, and with reference to definite plans of the engineers, which, when referred to generally in the act, thus become so far a part of it as to be binding upon the company to the extent of determining the datum line, and the line of railway measured with reference to that datum line; and the level of the railway, with reference to the datum line; but not the surface levels, unless expressly so provided in the act.[1]

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[1] North British Railway *v.* Tod, 4 Railw. C. 449. This was an appeal from the judgment of the Court of Sessions in Scotland. The opinions of Lord *Lyndhurst*, Chancellor, and of Lord *Campbell*, Ch. J., certainly exhibit the rule of the English law upon this subject very fully and very ably. Lord *Lyndhurst* says: "Now as to the effect of plans exhibited previous to the contract being made, or previous to the act of parliament being obtained, it does seem, from cases which have occurred, both in Scotland and this country, that the rule of the courts in this country, and in the other, is no longer a matter of any doubt or dispute. If a contract or an act of parliament, refer to a plan, to the extent that the act refers to the plan, and for the purpose for which the act or contract refers to the plan, undoubtedly it is part of the contract or part of the act. As to that, there is no dispute. A contract, or an act of parliament, either does not refer to a plan

*2. The question in this last case[1] was in regard to the right to intersect an approach, leading to a mansion-house, at a dif-

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at all, or it refers to it for particular purposes. It has been contended, both in Scotland and in England, that the defendant in the suit, or those who claim the benefit of the provisions of an act of parliament, previous to this enactment being made, or the contract being concluded, have represented that the works are to be carried on in a particular mode, upon a plan shown previous to the powers being obtained under the act, or the contract being concluded, and that the party obtaining the act, or obtaining the contract, is bound by such representation. There was a case very much considered in Scotland, the case of The Feoffees of Heriot's Hospital *v.* Gibson, 2 Dowl. 301; and several cases have occurred in the courts of equity in this country. It was my fortune to have to consider the matter very minutely in the case of Squire *v.* Campbell, 1 My. & Cr. 459, in which I thought it my duty to review all the cases that had occurred in the one country and in the other, for the purpose, if possible, of establishing a rule which might be a guide on future occasions when similar cases should occur; and I found that, certainly, what had been very much the opinion of the profession in this country, namely, that the parties were bound by the exhibition of such plans, had met with a very wholesome correction by the doctrine laid down by Lord *Eldon*, and Lord *Redesdale*, in the case of Heriot's Hospital, decided by this House. Under the authority of that case, in which the point was very distinctly raised, and deliberately decided upon, I came to the conclusion that there was no ground for equitable interposition. Now, my Lords, not relying upon the authority of Squire *v.* Campbell, but relying, as we are bound to do, upon the case of The Feoffees of Heriot's Hospital, I consider that to be the rule to which the courts of this country, and the Courts of Session in Scotland, and this House, must hereafter adhere. Taking that, then, to be the rule in examining the facts of this case, and the act of parliament upon which the question turns, we are not to look at what was represented upon the plan, except so far as its representation is incorporated in, and made part of, the act of parliament; and the real question, therefore, turns upon this, whether the acts of parliament do or do not make the datum line, and line of railway with reference to that datum line, the subject-matter of these enactments and the rule by which the rights of the parties are to be regulated, or whether it also includes the surfaces which, in this instance, accidentally, no doubt, had been very much misrepresented upon the plan.

"I say, then, that a case does arise upon these provisions of the act, in which the plan indeed is referred to, but is, in the terms of the act of parliament, referred to only for the purpose of ascertaining the line of the railway, with reference to the datum line. It is not referred to with reference to any surface level. The plan, therefore, is entirely out of the enactment, and is not to be looked at for the purpose of construing the enactment as to any part of it, except so far as it is referred to and incorporated in the act. Arriving at that construction of the rule upon the provisions of the two acts to which I have referred, and applying it to the principle which has been established in the cases I have mentioned, we have no difficulty in coming to the conclusion, that the application of that principle,

ferent * level from that laid down in the parliamentary plans, in which it appeared, as a cutting of fifteen feet, and the way raised

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will necessarily lead to the construction of the clauses to which I have referred. The plan is binding, to the extent of determining the datum line, and the line of railway measured with reference to that datum line, but not with reference to the surface levels of the land, because the act does not apply it for that purpose, but cautiously confines the enactment to the other plans to which I have referred.

"Acting, therefore, upon the principle so established, and with reference to the construction, or what I conceive to be the construction, to be put upon these sections, although we cannot but greatly lament the hardships which, in all probability, these circumstances have imposed upon the respondent, in having his land interfered with in a manner which he did not at all anticipate; yet, when we are called upon to consider whether the Court of Sessions is correct or not, we are bound to look to see what are the powers which these acts vest in the company; and for the reason I have explained, I come to the conclusion that the company have not exceeded those powers, and do not propose to exceed those powers, in the plans that they have formed, and that the Court of Sessions has been in error in granting the interdict."

Lord *Campbell*.—"I acknowledge that I come to the conclusion at which I have arrived with very great reluctance. It seems to me to be a case of very great hardship upon the respondent. But when we come to consider what the law upon the subject is, I feel bound to concur in the opinion which has been expressed. What is the legal construction of the act of parliament? Does the company, or does it not, propose to exceed the powers which the acts of parliament confer upon it? Now it is admitted, that if the deviation is to be calculated from the datum line alone, they (the company) do not propose, either vertically or laterally, to exceed the powers of deviation which are conferred upon them. Well, then, that raises the question whether those powers of deviation are to be calculated from the datum line alone, or whether the surface-level is to be taken into consideration? and my opinion is, that the act does refer every thing to the datum line. I think it is evident that the 11th section clearly makes the datum line alone, that which is to be regarded. The word 'levels,' in the plural number, really does not at all include the surface-levels. It means merely the levels of the datum line, which point out the course the railway is to go. If that be so, the company do not propose to do any thing that they are not authorized to do, according to the letter of the act of parliament.

"There certainly was a representation made here on the part of the company, when they proposed to bring in the act, by which they intimated that, at that time, the intention was that the railway should be fifteen feet four inches, below the surface of the respondent's property at the point of intersection; and that the bridge by which his approach should pass over the railway, would not be more than three feet. But this was entirely an intimation, on the part of the company, that such was their intention. An act of parliament of this sort has, by Lord *Eldon* and all other judges who have considered the subject, been considered as a contract. Well, then, what took place was a negotiation, it was not a contract. We must disregard it, and we must look to see what the contract

upon a * bridge two feet. The owner of the house, it seems, had opposed the railway being carried through his avenue, but, relying upon the representations contained in the plan and sections, was induced to abstain from opposing the bill. The line of deviation is marked upon the plan, and is by the act limited to ten yards in passing through villages, and one hundred yards in the open country.

3. In this case it was decided, that the plans were only binding upon the company to the extent to which they were referred to in the act, and that it made no difference that the deposited plans were so incorrect as altogether to mislead the owner of the lands, in reference to the manner in which his property would be affected by the railway works. The plans not being referred to in the act, or only referred to, as in the present case, to determine the datum line, with reference to lateral deviation, could not control beyond the matter of lateral deviation.

4. This subject is incidentally connected with the performance of construction contracts. But it has been held that, where the company deviate from the intended line of the road, even beyond

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was. The contract is to be gathered from the words of the act of parliament; and that brings us to the question that I first considered, what is the construction of the act of parliament? That act of parliament must be considered as overruling and doing away with every thing that had taken place prior to the time when the act passed, and renders the representation or proposal of the company, pending the act, of no avail. Many cases have occurred in the courts of common law in which it has been held that every thing that takes place before a written contract is signed, is entirely to be disregarded in construing the contract. Now, if the respondent had been cautious, he would have done what I would strongly recommend to all gentlemen hereafter to do, under similar circumstances, which is, to have a special clause introduced into the act of parliament to protect their rights."

See also Beardmer *v.* The London & N. Western Railway, 5 Railw. C. 728. The same rule obtains in this country. Boston & Prov. Railway *v.* Midland Railway, 1 Gray, 340; 8 Cush. 240. It seems that the deviation of five feet, which, by the 11th section of the Railways Clauses Act of 1845, is allowed in regard to levels, is to be reckoned, with reference to the level of the datum line, and not with reference to the surface-levels delineated on the plans. And any greater deviation in regard to levels, which may be obtained, under certain conditions, in certain emergencies, is subject to the discretion of the Railway Commissioners; and at the suit of land-owners, affected by such deviation, beyond the limits allowed by the act, the Court of Chancery will restrain the company from proceeding until they obtain the judgment of such commissioners. Pearce *v.* Wycombe Railway, 19 Eng. L. & Eq. R. 122.

what was permitted by their act, with the consent of the land-owner, and the contractor never objected to the deviation, but continued to receive certificates of estimates, and payments, in * precisely the same mode in which he would have received them had the deviation not taken place, that it did not affect his liability upon the contract.[2]

5. A reference, in the special act, to the deposited plans, for one purpose, does not make them binding for all purposes.[3] So too where, by the general acts, a railway company has power to pass highways, and other roads, by bridges, or excavation, in their discretion, but their special act gives them power to pass them on a level, this will not compel them to do so; they may still exercise the power conferred by the general acts. And a special agreement with land-owners, that they will pass such roads on a level, being a contract in derogation of public right, inasmuch as the public security is greatly jeoparded thereby, will not be specifically enforced in a court of equity.[4]

6. The extent of deviation is to be measured from the line delineated upon the plans to the actual medium filum of the railway as constructed, and the fact of the embankments extending beyond that distance is no violation of the right of deviation allowed in the act.[5] Where a tunnel is marked upon the plans referred to in the act, it must be made in the exact position indicated, and the general right of deviation does not apply.[6] But the company may take lands within the line of deviation for a branch railway.[7] Under an act allowing land to be "taken when necessary for making and maintaining the said railway

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[2] Ranger *v.* The Great Western Railway, 27 Eng. L. & Eq. R. 35.

[3] Reg. *v.* Caledonia Railway, 3 Eng. L. & Eq. R. 285. Where there is a power given for deviation in the construction, which would render some portion of the delineated surveys impracticable, it must be taken, as of necessity, that the legislature intended the omission of such particulars, as became impracticable, in a given contingency allowed by the act.

[4] Braynton *v.* The London & North W. Railway, 4 Railw. C. 553. But the Lord Chancellor, upon appeal, considered that the agreement only extended to the land to be purchased, and that it contained nothing intended to limit the powers given to the company by the general acts.

[5] Doe d. Payne *v.* The Bristol & Exeter Railway, 2 Railw. C. 75; 6 M. & W. 320; Doe d. Armistead *v.* The North Staffordshire Railway, 4 Eng. L. & Eq. R. 216.

[6] Little *v.* The Newport, Ab. & Hereford Railway, 14 Eng. L. & Eq. R. 309.

[7] Sadd *v.* The Maldon, Witham & B. Railway, 2 Eng. L. & Eq. R. 410.

and works," it was held that the company might take lands for forming or enlarging stations, or places for carriages to collect and wait till trains are ready to start; and the Lord Chancellor said, in one case,[8] "The *term railway, by itself, includes all works authorized to be constructed; and for the purpose of constructing the railway, the company are authorized to construct such stations and other works as they may think proper."

7. And it would seem that where lands are designated by numbers on the plans, although not altogether within the line of deviation, they may be taken by the company when necessary for stations.[9]

8. And where, by a special act, a company were empowered to erect a market house on land described in the deposited plans, it was held that, as the land of the plaintiff was described in the plans, and as therefore it might be wanted, the company were authorized to take it, and that the company were to be regarded as the proper judges of what lands were necessary for the works.[10]

9. The trustees of a turnpike-road agreed to assent to a bill in parliament for the formation of a railway, on the condition that the railway should pass over the road at a sufficient elevation, and the road be not lowered, or otherwise prejudiced. It was held that this modified assent, not being embodied into any agreement between the trustees and company, or incorporated into the act, afforded no equitable ground for restraining the company from the exercise of all their powers under their act; that the company were authorized to sink the original surface of a turnpike-road to gain the requisite elevation for the arch of a bridge to carry the railway over the road, notwithstanding the effect might be to render the road liable to be occasionally flooded.[11] Any omission, misstatement, or erroneous description in the parliamentary plans referred to in the act, may be corrected on application to two justices, in the mode prescribed in the act.[12]

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8 Cother *v.* Midland Railway, 2 Phillips, 469.

9 Crawford *v.* Chester & Holyhead Railway, 11 Jur. 917; 1 Shelford, Bennet's ed. 617. But the deviation is not authorized for the purpose of taking materials alone. Bentinck *v.* Norfolk Estuary, 32 Law Times, 29.

10 Richards *v.* The Scarborough Public Market Co. 23 Eng. L. & Eq. R. 343.

11 Aldred *v.* The North Midland Railway, 1 Railw. C. 404.

12 Taylor *v.* Clemson, 3 Railw. C. 65, shows the mode of procedure in such cases.

10. By statute, in some of the states, a railway company who file the location of their road in the requisite office, are allowed to deviate, to any extent consistent with their charter, in the course of construction.[13] But it has been held that, after once locating *their road, their power to re-locate, and, for that purpose, to occupy the land of another or the public street, ceases.[14]

11. It has been held, that a grant to a railway company to construct their road between two towns, gave them implied authority to construct a branch to communicate with a depot and turn-table, on a street in one of the towns (New Orleans) off the direct line.[15]

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[13] The Boston & Providence Railway *v.* The Midland Railway, 1 Gray, 340. The charter gave the company power to construct their road in five mile sections, but not to begin the work within a prescribed distance of one terminus, or until all of its stock was taken by responsible persons, and one hundred and forty thousand dollars paid into the treasury, it was held, that this restriction, in regard to the subscription and payment of stock, did not fix a limitation upon the company in regard to building their whole road not in sections.

The courts, in interpreting an act of incorporation, will not examine what took place while it was passing through the legislature. Bank of Pennsylvania *v.* The Commonwealth, 19 Penn. R. 144.

[14] Little Miami Railway *v.* Naylor, 2 Ohio St. 235. And an authority to change the location of the line, during the work, does not imply power to change it after the road is complete. Moorhead *v.* Little Miami Railway, 17 Ohio, 340. The same view is maintained by Lord *Eldon*, Ch. in Blakemore *v.* Glamorganshire Canal Co. 1 My. & K. 154. But a different rule seems to be intimated in 2 Rich. 434, *ex parte*, S. C. Railway. But see Canal Co. *v.* Blakemore, 1 Cl. & Fin. 262; State *v.* Norwalk & Danbury Turnpike Co. 10 Conn. 157; Turnpike Co. *v.* Hosmer, 12 Conn. R. 364; Louisville & Nashville Branch Turnpike Co. *v.* Nashville & Kentucky Turnpike Co. 2 Swan, 282, where the proposition of the text is maintained. But in South Carolina Railway *v.* Blake, 9 Rich. 229, it is held, that a railway company have the same power to acquire land, either by grant or by compulsory proceedings, for the purpose of varying, altering, and repairing their road, as for the original purpose of locating and constructing it. But that the company are not the final arbiters in determining the exigency for taking the land. The petition of the company for taking the land should allege in detail the necessity for taking it, and the land-owner may traverse these allegations, and in that case this is tried as a preliminary question.

[15] Knight *v.* Carrolton Railway, 9 Louis. Ann. 284; N. O. & C. Railway *v.* Second Munic. of New Orleans, 1 id. 128. But where by the charter of a railway they were authorized to construct their road "from Charleston" to certain other points, it was held that this gave them no authority to enter the city, but that the boundary of the city was the terminus *a quo*. Northeast Railway *v.* Payne, 8 Rich. 177.

12. The grant to take land implies power to take buildings.[16] And a grant to take land for the company's road implies the right to take land for all the necessary works of the company, such as depots, car and engine houses, tanks, repairing shops, houses for switch and bridge tenders, and coal and wood yards, but not for *the erection of houses for servants, car and engine factories, coal-mines, etc.[17]

13. And a charter allowing the company to extend their line to a certain point, "thence running through Acton, Sudbury, Stow, Marlborough," &c., does not oblige the company to locate their road through these towns, in the order named in the charter. And a location of the road from Acton through Stow, to Sudbury, and thence through Stow again to Marlborough, was held to be a sufficient compliance with the grant.[18]

14. If the charter of a railway limit the line of construction, by the boundaries of a borough, and the boundaries of such borough are subsequently extended, that will not alter the right of the company in regard to the location of their road.[19] And an exclusive grant for a railway within certain limits defined at one terminus, by a city, is to be restrained to the limits of the city at the date of the grant.[20]

SECTION II.

DISTANCE, HOW MEASURED.

1. *This is affected by subject-matter.*
2. *Contracts to build railway, by rate per mile.*
3. *General rule to measure by straight line.*
4. *Same rule in regard to turnpike-roads.*

§ 106. 1. Questions of some perplexity sometimes arise in regard to the mode of measuring distance, in a statute or contract. The import of terms defining distance will be sometimes controlled by the context, or the subject-matter. In one case,[1]

[16] Brocket *v.* Railway, 14 Penn. 241.

[17] State *v.* Comm. of Mansfield, 3 Zab. (N. J.) 510; Vt. Cent. Railway *v.* Burlington, 28 Vt. R. 193; Nashville & C. Railway *v.* Cowardin, 11 Humph. 348.

[18] Commonwealth *v.* The Fitchburg Railway, 8 Cush. R. 240.

[19] Commonwealth *v.* Erie & North East Railway, 27 Penn. R. 339

[20] Ponchartrain Railway *v.* Lafayette & Pont. Railway, 10 Louis. Ann. Rep. 741.

[1] Leigh *v.* Hind, 9 B. & C. 774; s. c. 17 Eng. Comm. L. R. 495. But *Parke*,

where the assignor of the lease of a public-house in London, covenanted that he would not keep a public-house within a half a mile from the * premises assigned, it was held that the distance should be computed by the nearest way of access.

2. And contracts to be paid for constructing a turnpike, or railway, a given price by the mile would, ordinarily no doubt, require an admeasurement upon the line of the road. It was held in a late case, in Vermont, that in such cases the contractor is not entitled to compute the length of track, and thus include turnouts and side-tracks.[2] But, this might not exclude branch lines extending any considerable distance from the main track.

3. But, in general, the English courts have chosen to adhere to the rule laid down by *Parke*, J., in Leigh *v.* Hind, that distance is to be measured in a direct line, through a horizontal plane. Thus, in settlement cases, where the pauper laws provide that no person shall retain a settlement gained by possessing an estate or interest in a parish for a longer time than he shall inhabit "within ten miles thereof," it was held that the distance was to be measured in a direct line from the residence to the nearest point of the parish.[3] And the twenty miles within which the parties are required to reside, in certain cases affecting the jurisdiction of the county courts, by the recent statute, 9 & 10 Vict. c. 95, § 128, is to be computed in a direct line, without reference to the course of travel.[4]

4. And where a turnpike act provided, that no toll gate should be erected nor any toll taken, within three miles of B., and the road did not extend to B., but connected with another turnpike which did, and also a public road, made since the act was passed, it was held, that the three miles should be measured "in a straight line on a horizontal plane, and not along any of the roads."[5]

J. was of a different opinion, and said: "I should have thought that the proper mode of measuring the distance, would be to take a straight line from house to house, in common parlance, as the crow flies."

[2] Barker *v.* Troy and Rutland Railway, 27 Vt. R. 766.

[3] Regina *v.* Saffron & Walden, 9 Q. B. 76.

[4] Stokes *v.* Grissell, 25 Eng. L. & Eq. R. 336; Lake *v.* Butler, 30 Eng. L. & Eq. R. 264.

[5] Jewell *v.* Stead, 36 Eng. L. & Eq. R. 114. Lord *Campbell*, Ch. J., said: "I

*SECTION III.

MODE OF CONSTRUCTION, TO BE DONE WITH LEAST DAMAGE.

1. *Does not extend to form of the road, but the mode of construction.*
2. *Special provisions of act not controlled by this general one.*
3. *Works interfered with, to be restored, for all uses.*

§ 107. 1. It has been held, that the general provisions of the Railways Clauses Consolidation Act, that in the exercise of their powers, the company shall do as little damage as possible, and shall make satisfaction, to all parties interested, for all damages sustained by them, does not extend to the form of constructing the railway. It does not apply to what is done, but to the manner of doing it.

2. Hence, if by other sections of the statute or special act, the company are required to build bridges in a particular form, they may still do so, notwithstanding it may cause more damage to the owners of land, than to build them in some other form.[1]

3. And where, in a parliamentary contract, between the promoters of a railway and the proprietors of a ropery, it was stipulated that the railway should be so constructed, that when finished the level of the ropery should not be altered, nor the surface of the ropery in the least diminished, it was held the company were bound to restore the surface, so as to be available for all purposes, to which it might have been applied, before the construction of the railway, and not for the purposes of the ropery only.[2]

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am of opinion that the distance is to be measured by a straight line upon a horizontal plane." Lake *v.* Butler, *supra*, lays this down as a general rule. Lord *Campbell*, Ch. J.: "I think we ought to adopt that mode, which is most convenient and most certain. If the distance is to be measured by the nearest mode of communication, uncertainty will be introduced, whether it may be by foot way, or bridle way, or carriage way; and in some cases the distance must be travelled by all the three modes; and in others by a tidal river, in which case the distance would vary, at different times of the day; also the distance by carriage road might be shortened, or lengthened, by a new road being made. But if the other mode of calculation is adopted, no uncertainty will arise."

[1] Regina *v.* The East & W. I. Docks & B. J. R. 22 Eng. L. & Eq. R. 113.

[2] Harby *v.* The East & W. I. Docks & B. J. R. 1 De G. M. & G. 290.

*SECTION IV.

MODE OF CROSSING HIGHWAYS.

1. *English statutes require it should not be at grade.*
2. *Or if so, that gates should be erected and tended.*
3. *And if near a station, railway train not to exceed four miles an hour.*
4. *Cannot alter course of highway.*
5. *Mandamus does not lie where company have an election.*

§ 108. 1. By the general English statutes upon the subject of railways, it is provided, "that if the line of the railway pass any turnpike-road, or public highway, then, (except when otherwise provided by the special act,) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge."[1]

2. And by § 47 it is provided, that whenever the railway does pass any such road, upon a level, the company shall maintain gates, at every such crossing, either across the highway, or the railway, in the discretion of the railway commissioners, and employ suitable persons to tend the same, who are required to keep them constantly shut, except when some one is actually passing the highway, or railway, as the case may be.[2]

3. And where a railway passes a highway near a station, on a level, the trains are required to slacken their speed, so as not to pass the same, at any greater speed than four miles an hour.[3]

4. The right to raise or lower highways, in the construction of a railway, does not authorize the company to change the course of the highway, even with the consent of the town council, and for

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[1] Railway Clauses Consolidation Act, § 46. Mandamus requiring the company to carry their road over a highway, by means of a bridge, when that was the only mode in which it could be done, according to the level of the line of the railway at the time, was held bad. Southeastern Railway *v.* The Queen, 20 L. J. 428.

[2] A road on which toll-gates are erected and tolls taken, is a turnpike road. The Northam, B. & Roads Co. *v.* London & Southampton Railway, 6 M. & W. 428; 1 Railw. C. 653; Regina *v.* E. & W. I. Docks Railway Co. 22 Eng. L. & Eq. R. 113.

[3] § 48. Some similar provisions, in regard to the construction of railways in this country, seem almost indispensable to the public security. But the rage for cheap railways is so great, that nothing of the kind could be effected, we fear, at present.

*so doing the company were held liable to persons, who had sustained special damage thereby.[4]

5. The right to use "highways" in the construction of plank roads, contained in a general law, does not extend to military roads constructed by the United States, while the state was a territory,[5] but the legislature may grant such right, by the charter of the company.

6. And where a mandamus[6] recited that the railway, which defendants were empowered to make, crossed a certain public highway, not on a level, by means of a trench, twenty feet deep, and sixty-five feet wide, through and along which the railway had been carried, and the highway thereby cut through and rendered wholly impassable for passengers and carriages; and that a reasonable time had elapsed for defendants to cause the highway to be carried over the railway by means of a bridge, in the manner pointed out in the statute,[7] and commanded defendants to carry the highway over the railway, by means of a bridge, in conformity with the statute, particularly specifying the mode, it was held, that it not being otherwise specially provided in the company's charter, they had, by the general acts, an option to carry the highway over the railway, or the railway over the highway, by a bridge; and that the option was not determined, by the facts alleged in the writ, and the judgment of the Exchequer awarding the writ, was accordingly reversed, in the Queen's Bench.

SECTION V.

RIGHTS OF TELEGRAPH COMPANIES.

1. *Right to "pass directly across a railway," does not justify boring under it.*
2. *Exposition of the terms "under" and "across."*

§ 109. 1. Where a telegraph company had by their act the

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4 Hughes *v.* Providence & Wor. Railway, 2 R. I. 493. It is the duty of a railway company not to obstruct public roads, where they intersect the railway-track, either by stopping a train or otherwise; and the company must take the consequences of all such obstructions. Murray *v.* Railway Company, 10 Rich. (S. C.) R. 227.

5 Attorney-General *v.* Detroit & Erie Plank Road Co. 2 Mich. R. 138.

6 Regina *v.* The Southeastern Railway, 6 Eng. L. & Eq. R. 214.

7 8 and 9 Vict. c. 20.

power to pass under highways, but to pass "directly but not otherwise across any railway or canal," and a railway was laid upon the level of a highway, in accordance with their special act, it was *held that the telegraph company could carry their works, under the highway, at the point where it was intersected by the railway.[1] But the telegraph company, attempting to pass under the railway, in such a manner as to disturb their works, was held liable in trespass.[2]

2. *Parke*, B., in giving judgment, said: "Across seems therefore different from under, and the power to carry 'across' does not enable them to go under. It may be that this prohibition would not apply, if the railway were carried over a highway, at a great height, for then the highway and railway might be considered independent of each other."

SECTION VI.

DUTY IN REGARD TO SUBSTITUTED WORKS.

1. *Bound to repair bridge, substituted for ford, or to carry highway over railway.*
2. *The same rule has been applied to drains, substituted for others.*

§ 110. 1. Where a public company, as a navigation company, under the powers conferred, by the legislature, destroyed a ford and substituted a bridge, it was held, that they were liable to keep the bridge in repair.[1] So too, where such company cut through a highway, rendering a bridge necessary to carry the highway over the cut, the company are bound to keep such bridge in repair.[2]

2. So where a navigation company had power to use a public drain, by substituting another, or others, it was held that the company were bound to keep in repair the substituted drains, as well as to make them.[3]

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[1] Southeastern Railway *v.* European & Am. Tel. Co. 24 Eng. L. & Eq. R. 513.

[2] *Post*, § 137, 169, 182.

[1] Rex *v.* Inhabitants of Kent, 13 East, 220; Rex *v.* Inhabitants of Lindsey, 14 East, 317.

[2] Rex *v.* Kerrison, 3 M. & Sel. 526. This duty may be enforced by indictment. Regina *v.* Ely, 19 L. J. (M. C.) 223.

[3] Priestly *v.* Foulds, 2 Railw. C. 422; 2 Man. & Gr. 175.

*SECTION VII.

CONSTRUCTION OF CHARTER IN REGARD TO NATURE OF WORKS, AND MODE OF CONSTRUCTION.

§ 111. There are some cases in regard to the construction of railway works, and their requisite dimensions, which have come under the consideration of the courts, and where the decisions are of little precedent, for other cases, not altogether analogous, and on that account scarcely deserving an extended analysis, but which nevertheless we scarcely feel justified in wholly omitting here.[1]

SECTION VIII.

TERMS OF CONTRACT. MONEY PENALTIES. EXCUSE FOR NON-PERFORMANCE.

1. *Contracts for construction assume unusuol forms.*
2. *Estimates made by engineer.*
3. *Money penalties, liquidated damages. Full performance.*
4. *Excuses for non-performance.*
5. *Penalty not incurred, unless upon strictest construction.*
6. 7. *Contractor not entitled to any thing, for part-performance.*

Note 2. *Proper construction of the terms used in these contracts.*

8. *Contract for additional compensation must be strictly performed.*

§ 112. 1. As the time within which such works are to be accomplished is often limited in the act, and as the manner in

[1] Attorney-General *v.* London & Southampton Railway, 1 Railw. C. 302. This case is in regard to the width of a road under a railway bridge. Manchester & Leeds Railway *v.* Reg. (in error), 3 Railw. C. 633. The footpaths are not to be regarded as any part of the requisite width of the bridge. Reg. *v.* Rigby, 6 Railw. C. 479; Reg. *v.* London & Birmingham Railway, 1 Railw. C. 317. This is a case in regard to the width of a bridge over a highway. Reg. *v.* Birmingham & Gloucester Railway, 2 Railw. C. 694, which is a case in regard to the width of the approaches to a bridge across a railway. Reg. *v.* Eastern Counties Railway, 3 Railw. C. 22, as to the right to lower a street, in order to obtain the requisite height under a bridge, notwithstanding the provisions of the local paving act. Reg. *v.* Sharpe, 3 Railw. C. 33, as to the right to erect a bridge at a different angle from the former road. Where a special act required a company to strengthen a bridge described in the act, held that they might nevertheless pull down the old bridge and build a new one. Wood *v.* North Staffordshire Railway, 1 McNaugh. & G. 278; Rex *v.* Morris, 1 B. & Ad. 441, as to making a railway on a turnpike road. A turnpike road, having power to take tolls upon any way leading out of their road, may demand tolls of passengers crossing their road upon a railway granted subsequently. Rowe *v.* Shilson, 4 B. & Ad. 726.

which the * work is done, is of the greatest possible importance to the public safety, the law sanctions contracts for such undertakings, in forms not only unusual, but which might not be strictly binding perhaps in the case of ordinary contracts. For instance, it is not uncommon for the contract to impose penalties upon the contractor for slight deviations from the terms of agreement, and to secure to the company the absolute right to put an end to the contract, whenever they, or their engineer, are dissatisfied with the mode in which the work is done, or the progress made in it.

2. And it is almost universal, in these contracts in this country, to refer the quality and quantity of the work done, and the consequent amount of payments, to be made from time to time, to the absolute determination of an engineer employed by the company.[1]

3. The penalties which these contracts provide, either absolutely, or in the discretion of the company's engineer, for delay in the work, are to be regarded, commonly, in the nature of liquidated damages.[2] To entitle the party to recover for work

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Where a railway company, in the course of construction turned a stream of water, which by their charter they might do, restoring it to its former state, as near as practicable, and the new channel was properly guarded, as far as could be perceived, at the time of turning it, it was held, that the company were not obliged thereafter to watch the operation of the water and take precautions to prevent its encroaching upon the adjoining lands. Norris *v.* Vt. C. Railway, 28 Vt. R. 99.

[1] Ranger *v.* Great Western Railway, 1 Railw. C. 1; s. c. 3 id. 298; *ante*, § 105.

[2] Ranger *v.* Great Western Railway, 27 Eng. L. & Eq. R. 61. In regard to the penalties given by the contract, it is said here by the Lord Chancellor: "All the circumstances which have been relied on in the different reported cases, as distinguishing liquidated damages from penalty, are to be found here. The injury to be guarded against was one incapable of exact calculation. The sum to be paid is not the same for every default, for that which should occasion small as for that which should cause great inconvenience, but one increasing as the inconvenience would become more and more pressing; and, finally, the payments are themselves secured by the penalty of a bond; and this is hardly consistent with the notion that the payments secured were themselves only penal sums to secure something else. For these reasons, I think it clear that these payments, though called penalties, are in truth liquidated damages agreed on by the parties, and which the company might set off against the demand of the appellant upon them under the contract. But then the appellant contends that the company never had a title to recover these penalties, because the delays in respect of which they claimed were produced by the harassing and vexatious conduct of the respondents themselves, or their agents. It is sufficient on this head to say, that the ap-

done upon *construction contracts, he must show, either that he has performed the labor according to the contract, or that the other party has waived strict performance, or hindered it.[3]

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pellant, in my judgment, wholly fails to make out, in point of fact, the proposition for which he contends. The only penalties actually deducted are 200*l.* for five weeks' delay in completing the headings of tunnels 1 and 3 in contract 1 B, and 20*l.* for delay in the works of the Avon bridge. There is no doubt but that these sums were due, unless the appellant could relieve himself by showing that the delay had been forced on him by the company itself. The evidence altogether fails to satisfy me of this."

Where in a contract between the original contractors for building a railway and the sub-contractors, it was provided, that the work should be subject to the supervision and control of the engineer of the company, and that he should make monthly estimates, four fifths of which "value" should be paid to the sub-contractors; and when the work was completed, a final estimate; the monthly and final estimates, as to the quantity, character, and value of the work done, should be conclusive between the parties; and that if the contractor should not truly comply with his part of the agreement, or in case it should appear to the engineer, that the work did not progress with sufficient speed, the other party was to have power to annul the contract; and the unpaid portion of the road was to be forfeited by the sub-contractor, and become the property of the other party;

Held, that the award of the engineer declaring the work forfeited, was conclusive, and binding on the sub-contractor; that the action of the sub-contractor upon the contract, was in affirmance of the contract, and that he could not therefore impeach its stipulations.

That the term "value," as used in the contract, was to be distinguished from the term "price," fixed for the different classes of work, and that the engineer, in making monthly estimates, had a right to deduct from the amount of work done, sufficient to bring it to the average of all the work to be done, and is not bound to allow the sub-contractor the price stipulated in the contract, for work of this description.

If the company withheld unjustly funds due the sub-contractor, they could not fairly take advantage of the forfeiture declared for want of prosecution of the work. But the retention of the 20 per cent. in case of forfeiture, is intended as the measure of reparation, for the failure to perform the work, according to the contract, and not as a mere penalty.

The payment after the forfeiture, by one of the original contractors, of the hands who had been employed on the works by the sub-contractor, and furnishing money to carry on the work, is not a waiver of the forfeiture, especially if he was then ignorant that the work had been forfeited. Faunce *v.* Burke, 16 Penn. R. 469.

[3] Andrews *v.* The City of Portland, 35 Me. R. 475. And it was held here, that part payment, under the contract, after the contractor had failed in strict performance, was no waiver, unless the failure was known to the employer at the time of payment.

4. But the party may excuse full performance by showing that he was prevented by an injunction out of chancery at the suit of a third party.[4] Or, that the parties had entered into a new contract for the same work, upon different terms.[5]

5. Where the work was suspended at the request of the company, with the view to a new location, the company agreeing to pay the plaintiff $750 by way of damages, if the work should not be resumed within two years, and, if it was, the plaintiff to proceed with the work at the prices stipulated, upon those sections not altered; the route being altered as to some of the sections, upon *which the defendants resumed within the two years, employing others to do the work, without giving notice to plaintiff; held, that the plaintiff could not recover the damages agreed, as the work was resumed within the two years, but that the plaintiff was entitled to damages for not being employed to do the work.[6]

6. Where, by the terms of the contract, a proportion of the sum earned is to be paid monthly, and the remainder reserved, as security for the fulfilment of the contract, it was held, that nothing was due till the day of payment, which could be attached by trustee process.[7]

7. And where, in such case, the company have the power to determine the contract, and the reserved fund is thereby to be forfeited, and the company do so, after the contractor has worked one month and part of another, and has received the proportion of payment for the first month, it was held nothing was due to the contractor.[8]

8. Where a railway company, after making a contract for the construction of its road, became embarrassed and was unable to make payments to the contractor, and the president, who was a stockholder, and extensively interested in the success of the enterprise, made an additional agreement with the contractor that he would give him his notes to the amount of $10,000, if the work were completed by a day named, it was held that he was not liable upon the agreement unless the contractor performed

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[4] Whitfield *v.* Zellnor, 24 Miss. R. 663.

[5] Howard *v.* The Wilmington & Susquehannah Railway, 1 Gill, 311.

[6] Fowler *v.* Kennebec & Portland Railway, 31 Me. R. 197.

[7] Williams *v.* Androscoggin & Kennebec Railway, 36 Me. R. 201.

[8] Hennessey *v.* Farrell, 4 Cush. R. 267.

his part of the agreement by the day named. The notes were, by the terms of the agreement, to go in part payment of what was due from the company, and the new agreement was not to affect the subsisting contract with the company.[9]

SECTION IX.

FORM OF EXECUTION. EXTRA WORK. DEVIATIONS.

1. *No particular form of contract requisite generally.*
2. *But the express requirements of the charter must be complied with.*
3. *Extra work cannot be recovered of the company, unless done, upon the terms specified in contract.*
4. *If the company have the benefit of work are liable.*

§ 113. 1. No particular form of contract is requisite to bind the company, unless where the charter expressly requires it.[1] And although there seems still to be a failing effort in the English courts, to maintain the necessity of the contracts of corporations being under seal,[2] it is certain that the important business transactions of *daily occurrence, in both that country and here, where no such formality is resorted to by business corporations, in matters of contract; and where to look for any such solemnity would be little less than absurd, almost of necessity drive the courts of England to disregard the old rule of requiring the contracts of corporations to be made under the corporate seal.[6]

2. But when the charter of the corporation requires any particular form of authenticating their contracts, it cannot be dispensed with. As where by the charter of a railway company,

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[9] Slater *v.* Emerson, 19 How. U. S. R. 224.

[1] *Post*, § 137, 169, 182.

[2] Mayor of Ludlow *v.* Charlton, 6 M. & W. 815. But see Beverly *v.* Lincoln Gas Light & Coke Co. 6 Adol. & Ellis, 829; Dunston *v.* The Imperial Gas Co. 3 B. & Ad. 125. *Tindal*, Ch. J., in Gibson *v.* East India Co. 5 Bing. (N. C.) 262, by which it seems that the English courts except from the operation of the rule only such transactions of business corporations as could not reasonably be expected to be done under seal. But see Bank of Columbia *v.* Patterson, 7 Cranch, 299, and 2 Kent, Comm. 289, 291, and notes, where it is said the old rule is condemned, and English & American cases cited and commented upon. *Post*, § 182; United States Bank *v.* Dandridge, 12 Wheat. 64; Bank of the Metropolis *v.* Guttschlick, 14 Pet. R. 19; Norwich & Worcester Railway *v.* Cahill, 18 Conn. 484; San Antonio *v.* Lewis, 9 Texas, R. 69. See also Weston *v.* Bennett, 12 Barbour, 196; Rathbone *v.* Tioga Navigation Co. 2 Watts & Serg. 74.

the directors were authorized to use the common seal, and all contracts in writing, relating to the affairs of the company, and signed by any three of the directors, were to be binding on the company; and the company entered into a contract not under seal, by their secretary, to complete certain works, and, after part performance, the contractor was dismissed by the company, it was held he could not recover the value of the work done.[3]

* 3. But where the contract contains express provisions that no allowance shall be made against the company for extra work,

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[3] Diggle *v.* The London & Blackwall Railway, 6 Railw. C. 590. It is said, here, that a contract, to be binding on a corporation when not under seal, must be one of necessity, or of too frequent occurrence, or too trivial, to be made under seal. In a recent case in the Court of Exchequer, Williams *v.* Chester & Holyhead Railway, 5 Eng. L. & Eq. R. 497, *Martin*, B., thus comments upon the rule of evidence in regard to implied contracts of corporations. "Persons dealing with these companies should always bear in mind, that such companies are a corporation, a body essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials; and should insist upon these contracts being by deed under the seal of the company, or signed by directors in the manner prescribed by the act of parliament. There is no safety or security for any one dealing with such a body, on any other footing. The same observation also applies, in respect of any variation or alteration in a contract which has been made."

But see *post*, § 182, and cases cited. And where the assistant engineer upon a railway, having charge of the construction of a section of the road, becoming dissatisfied with the contractor, dismissed him, and assumed the work himself, agreeing with the workmen to see them paid, it was held his subsequent declarations could not be admitted, to charge the company for supplies furnished the contractors, on the ground that they were not made in the course of the performance of his duty, as agent of the company. Stiles *v.* The Western Railway, 8 Met. 44; 1 Am. Railw. C. 397. See also Underwood *v.* Hart, 23 Vt. R. 120, where the subject of the admissions of agents is discussed, and the cases revised.

If a contract under seal be enlarged by parol, and subsequently performed, or if the terms of the contract under seal be varied by parol, the proper remedy is by an action of assumpsit. Sherman *v.* Vermont Central Railway, 24 Vt. R. 347; Barker *v.* Troy & Rutland Railway, 27 Vt. R. 774. In Childs *v.* The Somerset and Kennebec Railw. in the Circuit Court of the United States, before Mr. Justice *Curtis*, 20 Law Rep. 561, it was held, that where the plaintiff, by special contract, agreed to build certain bridges and depots for the defendant corporation, for which he was to be paid partly in cash and partly in shares of their capital stock, and in the progress of the enterprise it became necessary to do much extra work, and furnish materials not provided for in the special contract; that the plaintiff was entitled to recover the whole value of the extra work and materials thus furnished in money, upon an implied assumpsit, and that the agreement to take pay in shares did not extend to this part of the work.

unless directed in writing under the hand of the engineer or some other person designated, or unless some other requisite formality be complied with, the party who performs extra work upon the assurance of any agent of the company, that it will be allowed by the company, without the requisite formality, must look to the agent for compensation, and cannot recover of the company, either at law or in equity.[4] So, under the English General Company Acts, where the directors are authorized to contract on the part of the company, although not in writing, when such contracts would, if entered into by private persons, be binding in that form, three directors being a quorum for that purpose, it was held that the mere fact that extra work was done with the approbation of the company's engineer, the special contract requiring written directions for all the work, had no tendency to prove a contract binding the company.[5]

4. In one very well considered case,[6] upon the subject of extra work, not authorized in the manner specified in the contract, it is said by the vice-chancellor: "From what I have been informed of the course taken at law in these cases, it is this: If, in an action by a contractor, it appears that the company have the benefit of the work, done with their knowledge, the court of law does not allow the company to take the benefit of that work without paying for it, although, in covenant, [or any action upon the contract,] the contractor cannot recover." This may be in accordance with the general rules of law applicable to the subject.[7]

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4 Kirk *v.* The Guardians of the Bromley Union, 2 Phill. 640; Thayer *v.* The Vermont Central Railway, 24 Vt. R. 440; Herrick *v.* Same, 27 Vt. R. 673; Vanderwerker *v.* Same, 27 Vt. R. 125, 130.

5 Homersham *v.* Wolverhampton Waterworks Co. 6 Railw. C. 790. *Pollock*, Ch. B., said: "The company is not bound by the mere order of the engineer, or by the contract with one director."

6 Nixon *v.* Taffvale Railway, 7 Hare, 136. But see *post*, § 169, 182.

7 Dyer *v.* Jones, 8 Vt. R. 205; Gilman *v.* Hall, 11 id. 511. But, in many cases, the work is done by a sub-contractor, and enures to the benefit of the original contractor, as in Thayer *v.* Vermont Central Railway, 24 Vt. R. 440, and would not therefore give any right of action against the company, although in one sense they may put the work to their own use, and so may be said to have the benefit of it, to some extent.

*SECTION X.

IF ONE PARTY REPUDIATE THE CONTRACT, THE OTHER MAY SUE PRESENTLY.

1. *Party repudiating excuses the other.*
2. *New contract valid.*
3. *President cannot bind the company.*

§ 114. 1. Questions often arise in regard to the right of a party to sue for damages, before the time for payment arrives, and before he has fully performed on his part. But it seems now to be well settled, that where one party absolutely repudiates the contract on his part, he thereby exonerates the other from further performance, and exposes himself presently to an action for damages.[1]

2. Where the contract is unconditionally repudiated by one party, before it is fully performed, it is competent for the other to stipulate for its performance, upon different terms, no doubt. And such stipulation, although not under seal, would probably be regarded, as made upon a valid and sufficient consideration; and if made by an agent of the former party to the contract, but who had not authority to bind his principal to such contract, it would nevertheless be binding upon the agent and other party contracting, and would not be required to be in writing, as it would be an original and not a collateral undertaking.

3. But it has been held, that after a railway company has entered into a written contract, for the performance of certain work, the promise of its president to allow additional compensation to the contractors, for the same work, is without consideration and not binding upon the company.[2]

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[1] Cort *v.* The Ambergate, Not. B. & E. J. Railway, 6 Eng. L. & Eq. R. 230; Planche *v.* Colburn, 8 Bing. 14; Hochster *v.* De Latour, 20 Eng. L. & Eq. R. 157. But in an action to recover damages on such contract, the jury are not to go into conjectural profits resulting from a sub-contract very much below what the plaintiff was to be paid, but only the difference between the contract price and the value of doing the work, at the time of the breach, can be given. Masterton *v.* Mayor of Brooklyn, 7 Hill, 61.

[2] Colcock *v.* Louisville Railway, 1 Strobhart, 329; Nesbitt *v.* L. C. & C. Railway, 2 Speers, S. C. R. 697. The controversy here is in regard to *hard pan* excavation. And as the plaintiff contracted to do all the work on the road, and to construct the road-bed, and his contract only provided for earth and rock excavation, he is bound to accept his estimates under the contract, and especially after

*SECTION XI.

DECISIONS OF REFEREES AND ARBITRATORS IN REGARD TO CONSTRUCTION CONTRACTS.

1. *Award valid if substantially correct.*
2. *Court will not set aside award, where it does substantial justice.*

§ 115. 1. The general rule of law, in regard to the decisions of arbitrators and referees, by which they have been held binding upon the parties, although not made strictly according to the technical rules of law, if understandingly made, and exempt from fraud or partiality, has been sometimes applied to contracts for construction of railway works, the settlement of which has been determined by an umpire. As where the contract reserved the right to the company to alter the gradients of the road, and to substitute piling for embankment without extra allowance. These alterations were made, and thus increased the expense to the contractors. The final settlement being made by referees, to whom "all matters in dispute, with the contract as a basis of settlement," were referred, and they having allowed the contractor compensation for this increased expense, it was held to be within the power conferred upon the referees.[1]

2. So, too, where the contract specified a price for earth excavation, and another for rock excavation, but nothing was said of "hard pan," a good deal of which occurred in the course of the work, which was admitted to be more expensive than the ordinary earth excavation. The whole subject was referred, and the plaintiff claimed in his specification thirty cents per yard, for excavating hard pan, and the referees allowed him fifty cents, on trial. The defendants objected to the allowance, being more than the claim. But the court said, where the testimony was received without objection, and showed the party entitled to re-

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having done so, he cannot claim extra compensation for excavating *hard pan*, even if he show that, by usage, "earth" has a technical meaning, and does not include *hard pan*.

[1] Porter *v.* Buckfield Branch Railway, 32 Maine R. 539. In this case the contract provided for payment of a portion of the price of the work, in the stock of the company, and the arbitrators directed, that the same proportion of their award should be paid by issuing certificates of stock, and the award was held valid in this particular also.

cover, beyond his specification, the court will not set aside the report, or grant a new *trial, where it is apparent the party has not recovered more than what he is fairly entitled to.[2]

SECTION XII.

DECISIONS OF COMPANY'S ENGINEERS.

1. *Estimates for advances, mere approximations, under English practice.*
2. *But where the engineer's estimates are final, can only be set aside, for partiality or mistake.*
3. *Contractor bound by practical construction of the contract.*
4. *Estimates do not conclude matters, not referred.*
5. *If contractor consent to accept pay in depreciated orders, he is bound by it.*
6. *Right of appeal lost by acquiescence.*
7. *Engineer cannot delegate his authority.*
8. *Arbitrator must notify parties, and act* bonâ fide.

§ 116. 1. The English contracts for railway construction generally contain a provision for referring the final settlement with the contractor, to an indifferent board of arbitrators, or one selected by the parties respectively, with the umpirage of a third party, in case of disagreement.[1] Under such contracts the provision in regard to monthly or semi-monthly estimates is such, that they are understood to be mere approximations, and it is only equivalent to a provision, that the company shall advance, from time to time, as the work progresses, a stipulated proportion of the work, which they shall, by their engineeer, adjudge to be done. All that is requisite to the validity of such estimates is, that they were made *bonâ fide*, and with the intention of acting, according to the exigency of the contract.[1]

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[2] Du Bois *v.* Delaware & Hudson Canal Co. 12 Wendell, 334.

[1] Ranger *v.* Great Western Railway, 27 Eng. L. & Eq. R. 35, 46.

So where in a canal contract, it is provided, that the engineer "shall in all cases determine the amount or quality of the several kinds of work" to be done, and the compensation therefor, and either party had the right to compel an indifferent reference, where they felt aggrieved by the decision of the engineer, "to investigate and determine all questions that may arise relating to compensation for work done under this contract;" it was held, this umpirage only extended to the final account of the engineer. People *v.* Benton, 7 Barb. 209.

Under a contract where the company stipulated to pay the contractor ninety per cent. of the work done, according to the engineer's estimate; and the engineer had the right to declare the contract abandoned, and in that event the ten per cent. became forfeited, and the engineer did so declare; it was held, that this did not absolve the company from the payment of the ninety per cent. upon

2. But where the contract contains provisions referring the estimate of the quantity and quality of the work absolutely to the determination of the company's engineer, or any particular party, and provides, as is not uncommon in this country, that his decision shall be final, no relief from his determination can ordinarily be obtained, even in a court of equity, unless upon the ground of *partiality, or obvious mistake, which latter is held to apply rather to the quantity, than the quality of the work, this being purely matter of judgment and discretion, and which was intended to be concluded, by the opinion of the arbitrator.[2]

3. If the contractor acquiesce in a particular construction of his contract, and allow his estimates, from time to time, to be made upon such basis, he will be bound by it thereafter.[3]

4. Where the contract specifies a price for rock excavation, and another for ordinary earth excavation, and, in the course of the work, a large quantity of *hard pan* was excavated, for which no provision was made in the contract, and the other party conceded, that compensation was due, beyond the price fixed in the contract for ordinary earth excavation, it was decided that the contractor might recover upon a *quantum meruit* count. And where the contract also provided that the engineer should finally determine all questions, necessary to the final adjustment of the *contract*, this did not render the engineer's estimate conclusive, as to the sum to be paid for excavating hard pan.[4] These points are both decided, mainly, it is presumed, upon the concession of the defendant, that the hard pan excavation was a matter alto-

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the work done by the contractor, before the contract was declared abandoned. Ricker *v.* Fairbanks, 40 Maine R. 43.

[2] Herrick *v.* The Vermont Central Railway, 27 Vt. R. 673; Kidwell *v.* Balt. & Ohio Railway, *infra;* Alton Railway *v.* Northcott, 15 Ill. R. 49. In this case it was held that the estimate of the umpire will not bind the parties, if based on an erroneous view of the contract.

So a court of equity may correct the mistakes of the engineer, although the contract stipulates, that his decision shall be final. Mansfield & Sandusky Railway *v.* Veeder, 17 Ohio, 385. So too where the engineer proved to be a stockholder in the company. Milnor *v.* The Georgia R. & Banking Co. 4 Ga. R. 385.

[3] Kidwell *v.* The Baltimore & Ohio Railway, 11 Grattan, 676. See also Commonwealth *v.* Clarkson, 3 Barr, 277.

[4] Dubois *v.* Delaware & Hudson Canal Co. 12 Wend. R. 334; 15 id. 87. See s. c. 4 Wend. R. 285. But see *ante*, § 114; Nesbitt *v.* L. C. &c. Railway, 2 Speers, 697, where *hard pan* seems to be regarded as earth excavation, unless there is some special provision in the contract *for estimating it otherwise.*

gether outside of the contract. Otherwise it might seem difficult to maintain their entire consistency with other decided cases.[5]

5. Where the contract gives the engineer power to stop the work, when the means of carrying it forward fail, and he informed the contractor it could not proceed, unless he would receive his monthly pay in orders, which were at a discount, and the *contractor consents to receive them, he is not entitled to recover of the company the amount of such depreciation.[6]

6. And although the contractor, by the contract, had the power to refuse to abide by the final estimates of the engineer, yet if he submitted to him his charges, for the work done, and made no objection to his making up the final estimate, he is bound thereby.[6]

7. Where in a contract for work upon a railway it was stipulated, that the work should be measured by defendant's engineer, or agent, which should be final and conclusive, it was held that such person could not delegate his authority, but that it was indispensable, that he should himself make the admeasurement. But in making the admeasurement, it is not necessary, that he should give previous notice to the parties, to enable them to be present.[7]

8. But if such agent is to make an estimate of certain expenses, to be allowed the plaintiff, and he proceeds to do so, in the absence of plaintiff and without notice to him, he will not be bound by the estimate. But such estimate will not be affected by the inadequacy of the amount, or that the usual means were not resorted to for ascertaining facts, if the umpire act *bonâ fide*, which is a fact to be determined by the jury.[7]

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[5] Morgan *v.* Birnie, 9 Bing. R. 672. See also Sherman *v.* The Mayor of New York, 1 Comst. 320.

[6] Kidwell *v.* The Baltimore & Ohio Railway, 11 Grattan, 676. See also Commonwealth *v.* Clarkson, 3 Barr, 277, upon the general subject of the conclusiveness of the engineer's estimate.

[7] Wilson *v.* York & Md. Railway Co. 11 Gill & Johns. 58. Gross negligence is not fraud, but is evidence to be considered by the jury. Id.

SECTION XIII.

RELIEF IN EQUITY FROM DECISIONS OF COMPANY'S ENGINEERS.

1. *Facts of an important case stated.*
2. *Claim of contractor in the bill.*
3. *Bill sustained. Amendment alleging mistake in estimates.*
4. *Relief only to be had in equity.*
5. *Proof of fraud must be very clear.*
6. *Engineer being shareholder, not valid objection.*
7. *Decision of engineer conclusive as to quality of work, but not as to quantity.*
8. *New contract condonation of old claims.*
9. *Account ordered after company had completed work.*
10. *Money penalties cannot be relieved against unless for fraud.*

n. 1. *Review of the cases upon this subject.*

§ 117. 1. In consequence of the peculiar stringency of the terms of contracts for railway construction, applications for relief in *equity have not been unfrequent. In one case[1] it was agreed

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[1] Ranger *v.* Great Western Railway, 1 Railw. C. 1; s. c. 13 Sim. 368.

And where by the contract the work was to be done to the satisfaction of the engineer of the defendants, and suit was brought without obtaining the judgment of the engineer, held, that it could not be maintained. Parkes *v.* The Great Western Railway, 3 Railw. C. 17.

This case is also found in 3 Railw. C. 298, and in 27 Eng. Law & Eq. R. 35.

This case came before the House of Lords, on appeal for final determination, May 26, 1854, just ten years after the decision in the V. C. court. The judgment was in the main affirmed, but in form was reversed, and sent back to the Court of Chancery, for an account to be taken between the parties, according to their respective rights, as established by the final decision.

The case, as it appeared on the final hearing, is deserving of a more extended notice. The following is the statement of the case, and the points ruled in the House of Lords.

In a contract between R. and a railway company for the performance by R. of a portion of the line of railway, after reciting that R. agreed to secure the due performance of his contract, by his bond in the penal sum of £4,000, conditioned for the payment to the company of certain fixed sums for every week in which the work should not be completed according to the contract, the penalty in each successive week to increase in a fixed proportion, it was witnessed, amongst other things, that in case R. should become insolvent, &c. or should, from any cause whatsoever, (not the act of the company,) not proceed in the works to the satisfaction of the company, the company might give to R. a notice in writing requiring him to proceed with the said works, and in case R. should for seven days after such notice make default in commencing or regularly proceeding with the said works, it should be lawful for the company to employ other persons to complete the works, and pay them out of the money which should be then remaining due to R. on account of his contract; and that the moneys previously paid to R. on account of any works should be considered as the full value, and be taken by him as in full payment and satisfaction, for all works done by him; and that all

by the contract, that every fortnight the engineer of the *company should ascertain the value of the work done, according to

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moneys which either then or thereafter would have been payable to R. together with all the tools and materials then being upon the works, should, upon such default as aforesaid, become and be in all respects considered as the absolute property of the company; and that if such moneys, tools, and materials, should not be sufficient to pay for the completion of the works, then R. should make good such deficiency on demand. It was then further witnessed, and the company covenanted to pay to R. for the completion of the works the sum of £63,028 16s., in the following manner, namely, every fourteen days four fifth parts of the whole value of the said works which shall have been actually performed during the preceding fourteen days, until there should be a reserved fund of £4,000, and then every fourteen days to pay the full value of such works, such value to be estimated by the principal engineer or his assistant, having reference as well to the prices in the schedule, (as to extra work,) as to the entire cost of the whole works; and at the expiration of one calendar month after the completion of the entire works, to pay one moiety of the £4,000 so retained in the hands of the company, and at the expiration of one year and a month, the remaining moiety of the £4,000. And it was lastly agreed, that during the progress of the works, the decision of the principal engineer for the time being of the company, with respect to the amount, state, condition, &c., or any other matter or thing whatsoever relating to the same, shall be final, and without appeal; but in case of dispute, after the completion of the contract, as to any matter of charge or account between the company and R., such dispute shall be finally settled by the arbitration of the said engineer on the part of the company, and an engineer appointed by R. on his part, or if they disagree, by an arbitrator to be named by them. After R. had proceeded to a very considerable extent towards the completion of his contract, the company, being dissatisfied with the progress of the works, gave the notice to R. mentioned in the contract, and after seven days they took possession of the works, and of all the tools and materials thereon, and completed the works by other parties. R. filed his bill, setting up a case of fraud against the company in concealing the nature of the strata through which cuttings and tunnels were to be made, and insisting that he was entitled to be paid for those works at fair prices, regardless of the contract; that the fortnightly certificates of the value of the works given by B., the engineer of the company, were void, and not binding upon him, in consequence of B. being a shareholder in the company; that he was entitled to be relieved against certain money penalties which had been charged against him in the engineer's certificates; that the company were not justified in taking possession of the works, tools, and materials; and that he was entitled to have an account taken of the value of the works done, on the footing that there were no contracts, or that they were abandoned; and that the company might be debited with the value of the engines, tools, materials, articles, and things of which the company took possession.

Held, first, that no case of fraud had been made out. But, *semble*, that although a corporation cannot be guilty of fraud, yet if their agents employed in carrying

its quality and relative proportion to the whole work; the contractor *to receive eighty per centum, the remainder being re-

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out a trading speculation be guilty of fraud, the corporation will be liable. Per the Lord Chancellor.

Secondly, that the principle which prevents a person being a judge in his own cause, (Dimes *v.* The Grand Junction Canal Co. 17 Jur. 73; s. c. 16 Eng. L. & Eq. R. 63,) does not apply to the case of the engineer of a railway company holding shares in that company, who, according to the terms of a contract between the company and a contractor, was, during the progress of the works, to give periodical certificates of the value of the works done, but which, on the completion of the contract, were not final.

Thirdly, that the money penalties had been properly charged against R., they being, upon the proper construction of the contract, not penalties, but liquidated damages.

Fourthly, that even assuming that the company were not justified in taking possession of the works, tools, and materials, after the notice given, R. was not entitled to treat the contract as not existing, or as abandoned. R.'s right would have been by action for damages, and the seizure by the company formed no ground for such equitable relief as was asked.

Fifthly, that, upon the true construction of the contract, the company did not, according to their contention, upon taking possession of the works and plant after notice, become absolute owners of the tools and materials, &c.; this whole provision is to be regarded, not in the nature of a penalty, but as mere machinery for enabling the company to complete the works at the cost of R., and the company are bound to account for the value of the tools and materials, in settling their accounts with him, which accounts were decreed to be taken on the footing of the contract. In regard to the competency of the engineer, the learned chancellor said: "When it is stipulated that certain questions shall be decided by the engineer appointed by the company, that is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision for itself, acting, however, as from the nature of things it must act, by an agent, and that agent was, for this purpose, the engineer. His decisions were, in fact, their decisions. The contract did not hold out, or pretend to hold out, to the appellant, that he was to look to the engineer in any other character than as the impersonation of the company. In fact, the contract treats his acts and their acts, for many purposes, as equivalent, or rather identical. I am, therefore, of opinion, that the principle on which the doctrines as to a judge rest, wholly fails as to its application to this case. The company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The company stipulated that their engineer for the time being, whosoever he might be, should be the person to decide disputes pending the progress of the works, and the appellant, by assenting to that stipulation, put it out of his power to object, on the ground of what has been called the "unindifferency" of the person by whose decision he agreed to be bound. It is to be observed, that the person to decide was not a particular individual, in

served to enforce the completion of the works. That if the engineer should *not be satisfied with the works, the company

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whom, notwithstanding his relation to the company, the contractor might have so much confidence as to agree to be bound by his awards, but any one from time to time the company might choose to select as their engineer. The appellant alleges that he did not know the fact that Mr. Brunel was a shareholder until more than two years after the works had been begun.

"But he must have known that the company had it in their power to appoint another engineer in Mr. Brunel's place, who might hold shares, or that Mr. Brunel himself might purchase shares. Without the intervention of the engineer, the contract was, as it were, paralyzed; nothing could be done under it; and it surely can hardly be argued that a person appointed engineer could, by purchasing shares, render the contract practically inoperative."

It is regarded as questionable, how far a contract, vesting the property of the contractor in the company, in the event of his insolvency merely, could be maintained, as consistent with the English bankrupt and insolvent laws. Rouch *v.* The Great W. Railway, 2 Railw. C. 505. But this objection may be obviated, by the company stipulating for a lien merely; a right to use the tools and materials of the contractor, in the completion of the work, according to and in fulfilment of his contract. Hawthorn *v.* Newcastle-upon-Tyne & N. Shield Railway, 2 Railw. C. 299. It is said in one case, by a very learned equity judge, Lord *Redesdale*, (O'Connor *v.* Spaight, 1 Sch. & Lef. 309,) that where an account has become so complicated that a court of law would be incompetent to examine it, upon a trial at Nisi Prius, with all necessary accuracy, a court of equity will, upon that ground alone, take cognizance of the case. But a court of equity will not ordinarily interfere in any such case, and especially when the party applying has been guilty of laches. Northwestern Railway *v.* Martin, 2 Phill. 758. See also Taff-Vale Railway *v.* Nixon, 1 H. L. Cas. 111; Faley *v.* Hill, 2 id. 45, 46. See also Nixon *v.* Taff-Vale Railway, 7 Hare, 136. It is questionable, we think, whether any such distinct ground of exclusive equity jurisdiction, in matters of account, as the complicated nature of the transactions can be maintained, but there is little doubt this would be regarded as an important consideration in guiding the discretion of that court, in assuming such jurisdiction, in any particular case, pending in a court of law. But sometimes where the contractor claims the right to appropriate payments, made generally, to a different contract from that upon which the company desire it to apply, it becomes necessary to draw the whole into a court of equity. Southeastern Railway *v.* Brogden, 14 Jur. 795; 3 McN. & G. 8. See upon the general subject Waring *v.* The Manch. & Sheffield & L. Railway, 7 Hare, 482. An important case, upon a contract for railway construction, finally determined in the national tribunal of last resort, upon elaborate argument and great consideration, and which involved most of the subjects involved in the case of Ranger *v.* The Great Western Railway, may be regarded, perhaps, as bearing something of the same relation to cases in this country upon that subject, which the English case does to cases of that kind in the English courts.

This is the case of Philadelphia, Wilmington, & Baltimore Railway *v.* Howard, 13 How. R. 307; 1 Am. Railw. C. 70. It came into the United States Supreme

should be enabled, after notice given to the contractor, and his default in complying, *for seven days, to take possession of the

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Court by writ of error to the Circuit Court of the United States for the District of Maryland. The facts in the case are complicated, and the points involved numerous. It will only be necessary to state the facts, in connection with the several points decided. The points bearing upon this subject are:—

In such contract, the covenant to finish the work, by a time named on the one part, and to pay monthly on the other part, are distinct and independent covenants. And a right to annul the contract, on the part of the company, at any time, did not include a right to forfeit the earnings of the other party, for work done prior to the time when the contract was annulled.

A covenant to execute the work, according to a certain schedule, which mentioned that it was to be done, according to the directions of the engineer, bound the company to pay for work done according to his directions, although not strictly in conformity with a profile showing the original proximate estimates.

And when the contract was to place the waste earth, where ordered by the engineer, it was the duty of the engineer to provide a convenient place, and if he failed to do so, the other party is entitled to damages.

Where the contract authorized the company to retain, until the completion of the contract, fifteen per cent. of the earnings of the contractor, by way of indemnity from loss, by any failure to perform the contract by the contractor, it was held this was not to be regarded as a forfeiture, and that the company, if they terminated the contract, were bound to pay the contractor any amount which they had so retained, unless the jury were satisfied the company had sustained loss by the default, negligence, or misconduct of the contractor, which should be deducted.

Where the contractor was delayed, in the progress of the work, by an injunction out of chancery, he is entitled to no damages, unless the jury find that the company did not use reasonable diligence in obtaining a dissolution of the injunction.

If a railway company, having the power reserved to them of annulling a contract for construction, "when, in their opinion, it is not in due progress of execution," or the contractor is "irregular or negligent," it was held that if they exercised this power, for the purpose of having the work done cheaper, or of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained, and of the reasons which influenced the company, the jury were to be judges.

And in Herrick *v.* Vermont Central Railway, 27 Vt. R. 673, the following points were decided upon this subject:—

A stipulation in a contract for the construction, in part, of a railway, that "the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal," is binding upon the parties, and constitutes the engineer an arbitrator or umpire between them.

Such a stipulation imposes upon the party, by whom the engineers are to be employed, the duty of employing for such engineers, competent, upright, and trustworthy persons, and to see to it that they perform the service expected of them, at a proper time and in a proper manner.

works, thereupon the plant and materials of the contractor, and all the work done, and not paid for, and the reserved fund to be forfeited to the company.

Such a stipulation, when construed with reference to its subject-matter, and the ordinary course of business, does not require the estimates to be made or verified by the chief engineer, but has reference, as well to the assistant, or resident engineer, by whom such estimates are usually made.

If payment for the work performed is dependent upon, and to be made according to the engineer's estimates, as to its amount, and the employing party performs its duty in reference to the employment of suitable engineers, &c., the obligation to pay will not arise until such estimates are made.

But if no estimates are made, through the neglect or fault of the engineer, or of the party who employs him, the other party could probably recover, at law, for the work performed by him, without any engineer's estimate of it.

A contract providing for monthly estimates of the contractor's work, according to which he is to be paid, imports an accurate measurement, and final estimate for each month, and not such a one as is merely approximate or conjectural.

A court of equity has jurisdiction of a claim to be paid for a larger amount of work, done under such a contract, than was estimated by the engineer, where the under-estimate was occasioned either by mistake or fraud.

The Vermont Central Railway Co. contracted with B. for the construction of their railway, and B. contracted with the orator for the construction of a part of it. In both contracts there was such a provision in reference to the conclusiveness of the engineer's estimates. *Held*, that there was no privity of contract between the orator and the Vermont Central Railway Co. and that he could not recover of them for work not estimated by the engineer, by reason only of a mistake, which they had not, either directly or indirectly, caused or connived at; and that their indebtedness to B. for the same work for which he was indebted to the orator, did not constitute a fund against which the orator had a claim.

But if there was any connivance on the part of the Vermont Central Railway Co. or their agents, in bringing about the under-estimates complained of, even if it was without the design, ultimately to defraud, but only, as a temporary expedient for present relief, the orator would be entitled to recover of them the loss which he sustained by reason thereof.

The orator claimed in his bill, that he had been under-estimated a given amount, for the payment of which he instituted the present suit; by the report of the Master, the amount not estimated was found to be more than twice that amount. *Held*, that the orator should be limited to the amount claimed in his bill.

The report of a Master in Chancery upon the taking of an account, should contain a succinct statement of all the points made by counsel, and the facts found by him upon each point.

The testimony given *viva voce* before a Master in Chancery, in taking an account, or a copy of it, should be returned to the court, with his report.

The Master should also state the account, at length, and all the facts found by him, so that they will be intelligible, without reference to the testimony.

*2. The company having taken the forfeiture under the contract, the plaintiff filed his bill, insisting that the engineer had under-estimated the work £30,000, and that no forfeiture had been incurred by him, and praying that the company might elect to permit the plaintiff to complete the works, or that the contract might be considered at an end, and in either case an account between the parties might be taken.

3. The Lord Chancellor held, that the facts alleged do entitle the plaintiff to relief in equity. The plaintiff amended his bill, *and alleged that the most expensive masonry had been paid for only at the price of inferior work, and claimed large sums in that respect, and also alleged fraud against the company, in the contracts, and in the certificates.

4. It was held, that the investigations, as to the sufficiency of the payments made, could only be made in a court of equity.

5. That the evidence in support of an allegation of fraud must be very clear, and that it is not enough to show, that the statements of the company, as to the nature of the work, gave imperfect information, but it must also be shown, that the contractor could not with reasonable diligence, have acquired all necessary information.

6. The fact of the engineer being a shareholder in the company, is not enough to avoid his decision, as the contractor might have ascertained this fact. The character of an engineer is of more value to him than his interest as a shareholder.

7. That the decision of the engineer, as to the quality of the

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In a contract for railway construction, where the parties by a subsequent contract stipulated for the completing of the work, by a day named, for the additional price of £15,000, and a further stipulation that the contractor should pay the company £300, for each day's delay beyond the time specified, the company to furnish the rails and chairs, blocks, &c., to complete the same, by the day specified. The work was not finished for twenty-four days after the time specified, and the rails, chairs, blocks, &c. were not furnished to complete it sooner. The court held the covenants independent of each other, and the contractor bound to deduct the stipulated forfeiture, notwithstanding the default of the company. McIntosh *v.* Midland Counties Railway, 14 M. & W. 548; s. c. 3 Railw. C. 780. The rule of law that covenants, which are not the entire consideration for each other, will ordinarily be construed as independent, unless there is something in the transaction which shows the parties regarded them as dependent, is certainly carried further in this case, than reason and justice would seem to justify. We think this case would not be followed in this country.

work, is conclusive, but not as to the quantity. The question of measurement and calculation will be entertained and decided by a court of equity.

8. That where the parties have entered into new contracts, it will be considered a condonation of old injuries, unless, at the time of making the new contract, the plaintiff insisted upon his adverse claims, the parties being at liberty to proceed at law.

9. After the works were completed by the company, the court ordered an account taken, directing special inquiries as to the amount and kind of work done.

10. It was held that stipulations in regard to penalties, in these contracts, are binding upon the parties, and no relief against them will be afforded in equity, unless fraud be shown. And that, where it had been agreed that a written contract should form part of an unwritten one, this will include stipulations, as to forfeiture.[1]

*SECTION XIV.

FRAUD IN CONTRACTS FOR CONSTRUCTION.

1. *Relievable in equity upon general principles.*
2. *Statement of leading cases upon this subject.*
3. *Where no definite contract closed, no relief can be granted.*

§ 118. 1. It is well known that courts of equity will relieve against fraud, practised by the agents of railways, in building contracts, the same as in other cases of fraud. But the importance and peculiar nature of these contracts, will justify a brief note of the cases decided upon the subject.

2. The most important case, in the English books, upon this subject, is that of Ranger *v.* The Great Western Railway, which we have just referred to upon another point.[1] And the state-

[1] 1 Railw. C. 1; 3 Railw. C. 298. On appeal in the House of Lords, 27 Eng. L. & Eq. R. 35, 41. In regard to fraud, on the part of railway companies, in building contracts, the Lord Chancellor said: "The first ground on which the appellant rests his title to relief is, that he was induced to enter into the contract by the fraud of the company; that the sum at which he agreed to do the works was far below what he would have required, had he known the real nature of the soil through which the tunnels were to be made; but on this point he had been misled by the fraudulent contrivance of the respondents. The case made by the bill on this head is, that there being on the line of the road to be made for the

ment * of that case, in the House of Lords, by the Lord Chancellor *Cranworth*, is a better commentary, than elsewhere exists,

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railway in the neighborhood of Bristol three kinds of stone, sandstone, Dunns or Dunn stone, and Pennant or Hanham stone, of which the first (that is, sandstone) is comparatively soft and easy to work, whereas the other two kinds (particularly the latter) are hard and difficult to work, the company acting through Mr. Brunel, their engineer, fraudulently contrived to make the appellant believe that the cuttings would be through the softer material, (sandstone,) and not through Dunns or Pennant stone, whereas the fact was, as they well knew, that the line was chiefly through the harder sorts of stone. The bill represents, that, for the purpose of enabling persons desirous of contracting, to make the road along the line included in the contract described as 1 B, to tender for the same, it was necessary that in different parts of that portion of the intended line pits should be sunk, called 'trial pits,' in order that the nature of the strata might be previously known; and accordingly that the respondents did sink ten such pits, but that eight of them were only sunk to the depth of a few feet, and were, therefore, of little or no use in showing what would be the nature of the soil at the level of the line of the railway, which was at a very considerable depth below the surface; and the other two were sunk respectively to depths of 78 and 55 feet only, at points where the intended line of road was in one case 112 feet and in the other 97 feet below the surface, so that these two pits did not reach the level of the railway, in one case by 34 feet, and in the other by 42 feet. The bill further alleges that the soil dug out of all of the said pits was laid on the surface near the mouth, and showed apparently a substratum of sandstone, the workmen employed to sink the pits having by directions from the company ceased to dig when they reached the hard stone, except that out of the bottom of one of the deep pits some Dunn stone was taken, but which had crumbled away when exposed to the air.

"The bill then goes on to charge, in substance, that the company, with knowledge that the cuttings would have to be made through the harder sorts of stone, caused notice to be given by advertisement, that they were ready to receive tenders according to certain printed forms circulated for the purpose, and the nature of the works to be done was to be ascertained from a specification deposited in their office at Bristol. The specification described the works for which the tender was to be made. The printed form of tender contained an undertaking by the party tendering, not only that he would do the contract works at a specified sum, but also that he would do any extra works, and make any alterations in or additions to the original works which might be deemed expedient in the course of their progress, on being paid for the same according to certain rates set out in a schedule of prices annexed to the tender. The different heads under which charges were to be made by the contractor, in respect of such extra or altered works were all printed as part of the form of tender, and the party tendering was to write against each such head the price at which he would agree to be bound to do the same works of the nature there referred to. Amongst the works so to be done was the excavating clay, shell, and sandstone, but there was no mention in the schedule of any other stone. Neither Dunn stone nor Pennant are refer-

upon this *subject. The general subject of fraud, in railway

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red to by name; and the suggestion of the bill is, that the omission of any mention of Dunn or Pennant stone was a contrivance, or part of a contrivance, for the purpose of leading the persons tendering, to suppose that they might make their calculations on the footing of there being no hard stone to be cut through,—a supposition which would be confirmed by the trial pits, out of which no hard stone had been dug, except the small portion of Dunn stone from one of the pits, which, as I have already stated, crumbled away when exposed to the air.

"The appellant was resident in London, and in order to enable him to make his tender, he sent down to Bristol an agent, Thomas Lloyd, whom he represents as a competent judge in such matters, to examine the line of the proposed works, so as to enable him to form a correct judgment as to what would be a fair amount to be tendered. The bill states that Lloyd accordingly proceeded to Bristol in the month of March, 1836, surveyed the line and inspected the trial pits, and that, reasonably supposing the two principal pits to have been sunk to the level, and not finding amongst the excavated material accumulated on the surface any thing but soft or loose stone—no Pennant or Hanham stone—he concluded that there would be no cutting through hard stone; and the sum tendered was calculated on that basis. It was, according to the bill, impossible for Lloyd to get down to or near the bottom of the two principal trial pits, in consequence of their being nearly filled up with rubbish and water before he examined them. The appellant, therefore, contends that he was imposed upon as to the nature of the work he had to perform, and so agreed to do it on terms to which, but for the deception practised upon him, he would not have consented. The question on this part of the case is one of fact. Is it established that any imposition was practised on the appellant to induce him to enter into the contract? For if there was, he was clearly entitled to relief,—whether precisely that which he asks for, is another question. Strictly speaking, a corporation cannot of itself be guilty of fraud; but where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that, if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. The question, therefore, on this part of the case is, whether the directors, or the engineers, or agents, whom they employed, were guilty of the fraudulent misrepresentations alleged by the bill. I am clearly of opinion that no such case is made out. [His lordship here stated the nature of the evidence on this point, and continued]:—

"Two engineers, Mr. Frere and Mr. Babbage, both say that the appellant had ample opportunity, by means of the trial pits and cuttings, of ascertaining the nature of the soil and strata; and the circumstances of the case satisfy me that this must be true. The work to be done was of a laborious, difficult, and expensive character. The notices calling for tenders had been circulated for many weeks, and even months, and would naturally excite the attention of contractors of eminence, who would be drawn to the spot. I cannot attribute to the company

companies, in *regard to building contracts, is somewhat considered, in a late case, in the Supreme Court of Vermont.[2]

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the fraudulent intention imputed to them—an intention as absurd as it would have been fraudulent—of meaning to mislead those who should apply to make tenders for the work, when they must have felt that the success of such a fraud must entirely depend on the very improbable chance, that those who should be attracted by the notices, would omit to make inquiry into the nature of the soil they would have to excavate. The work was not one of a trifling nature; one of the persons who made a tender, demanded above £100,000. The tenders were, in the first instance, to be made before the 1st March, 1836; and until nearly a fortnight after that date, the two principal trial pits had been open, and free from water, so that there was nothing to prevent any contractor from himself ascertaining to what depth it had been cut, and what was the soil at the bottom; and though by the 12th March a great deal of water had entered and so partially choked the two principal pits, yet Mr. Frere says the company and their engineers were always ready to facilitate the appellant's investigation as to the nature of the soil and strata.

"The appellant, in his bill, assumes that sandstone and pennant stone are two different kinds of stone, but this is not the conclusion at which, on the evidence, I arrive. 'Pennant stone,' says Mr. Brunel, 'is a species of sandstone, and the only species in the neighborhood of Bristol, of sufficient hardness to be used for bridges, or other strong masonry.' And Mr. Frere says that it is extensively used in Bristol, and is the hardest sort of sandstone found in that neighborhood, except the Brandon Hill stone. Dunn stone, according to the same witness, is merely a local term for a particular variety of shale, and is frequently found in cuttings along with sandstone. This explanation fully justifies the language of the tenders, without supposing that the materials to be excavated and removed were there mentioned by the company for any purpose of deception. The soil to be removed was sufficiently designated as consisting of clay, shale, and sandstone, the latter term comprehending all sandstone, hard as well as soft; that is, Pennant or Hanham stone, (which is in truth only Pennant stone found at Hanham,) as well as ordinary sandstone. In the contract 2 B, the expression occurs, 'compact gray sandstone, commonly called Hanham stone.' It was for the appellant, before he made a tender, to satisfy himself as to the probable hardness of the sandstone to be removed, which, after all, could never be ascertained beforehand with perfect certainty. By examining the trial pits and cuttings, and making inquiries of the engineers, he might have ascertained the depth to which the pits had been sunk, and the nature of the soil through which they had penetrated, and at which they had arrived. The cuttings, according to the evidence of Mr. Frere, exhibited sandstone, Pennant, and Dunn stone; and the old quarry in Fox's Wood showed Pennant.

"In these circumstances, I think it is impossible to believe that there was any thing like contrivance to mislead the appellant or any other contractor; and it is clear that the appellant, if there was no fraud, was bound to satisfy himself on the

2 Herrick *v.* The Vermont Central Railway, 27 Vt. R. 673.

*3. But it is clear that where no binding and complete contract has been entered into by the company, although the tenders made by a contractor have been accepted by their engineer, authorized to act on their behalf, and the contractor has incurred expense, upon the faith of having the contract, in preparation to fulfil it, there being certain alternatives in the tender, which had not been decided upon, and the whole thing being given up, and no specific contract made under the seal of the company, that equity can grant no relief.[3] For if there was no contract equity could not create one, and if there was a valid contract, the remedy at law is adequate.

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subject; for the specification of the proposed works, submitted to him before the tender was made, expressly stipulates that the contractor must satisfy himself of the nature of the soil, and of all matters which can in any way influence his contract. This, though of course it would not absolve the company from the consequences of any fraudulent contrivances to mislead, yet certainly, in the absence of fraud, threw on the appellant the obligation of judging for himself. I must further add, that I cannot believe the appellant to have been really mistaken as to the nature of the soil, except, possibly, that the proportion of hard stone was greater than he had imagined he should find. I come to this conclusion from the fact, that the specification, which was submitted to him before he made the tender, provides for the construction of the Avon bridge, and other masonry, by means of the stone to be obtained from the cuttings. Now, Mr. Brunel says that Pennant is the only sandstone in the neighborhood of Bristol, of sufficient hardness to be used for masonry. The appellant either did know, or might have known this, when he made his tender, and it is surely impossible for him, in the face of such a clause in the specification, to say that he did not know there would be any beds of Pennant stone—that is, of stone capable of being used for masonry—to be excavated or removed. It is not unworthy of observation, that Mr. Stanton, one of the persons who made a tender, in his schedule of prices as to the sum which he would require for working sandstone, obviously points to the difference which might exist in the expense of removing sandstone of different qualities; and he did not, like the appellant and the other persons who made tenders, offer one fixed uniform sum for sandstone of every quality, but he required for moving, &c. sandstone from open cuttings, 1*s.* 4*d.* to 2*s.* 2*d.*, and from tunnels, 2*s.* 9*d.* to 4*s.* 6*d.*; from which, I think, it may be fairly inferred that he understood the words 'sandstone' used in the schedule to include stone of different degrees of hardness; some more expensive to work, some less so. To all these considerations must be added, that the appellant did not, so far as there is any evidence on the subject, make any remonstrance as to the supposed deception or mistake during the progress of the works, nor until after the relation between the parties had been entirely determined."

[3] Jackson *v.* The North Wales Railway, 6 Railw. C. 112.

SECTION XV.

ENGINEER'S ESTIMATE WANTING THROUGH FAULT OF COMPANY.

1. *In such case contractor may maintain bill in equity.*
2. *Grounds of equitable interference.*
3. *After company terminate contract, contractor will be enjoined from interference.*
4. *Stipulation requiring engineer's estimate, not void.*
5. *Not the same as an agreement, that all disputes shall be decided by arbitration.*
6. *Engineer's estimate proper condition precedent.*
7. *Same as sale of goods, at the valuation of third party.*
8. *The result of all the English cases, seems to be, that only the question of damages is properly referable to the engineer.*
9. *The rule in this respect different, in this country.*

§ 119. 1. Where by the terms of a railway construction contract, executed under the seals of the parties, the work is to be paid for, from time to time, upon the estimate, and approval of the company's principal engineer, and the amount and quality of the work finally to be determined, in the same mode, no action, either at law or in equity can be maintained, until such estimate and approval is obtained, unless it is prevented by the fault of the company. But where no such engineer is furnished by the company, or where through their connivance he neglects to act, the *contractor is not without remedy, in equity.[1] Lord Chancellor *Cottenham*, in affirming this decision,[2] says:—

2. "It is true that the specification and contract constitute a relationship between the plaintiffs and the defendants, which, if correctly acted upon, would have given to the plaintiffs a legal right, and a legal right only, to the benefits they claimed by this bill. But if the facts stated in the bill are such as, if true, deprive the plaintiffs of the means of enforcing such legal rights, and if those facts have arisen from the conduct of the defendants, or of their agent so recognized by the specification and contract, and now used for the fraudulent purpose of defeating the plaintiff's claim altogether, the defendants cannot resist the plaintiff's claim in equity upon the ground that their remedy is only at law; nor is it any answer to show that, if the plaintiffs

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1 McIntosh *v.* The Great Western Railway, 2 De G. & S. 758. This is the decision of the Vice-Chancellor, which came before the Lord Chancellor, as mentioned in note 2.

2 McIntosh *v.* The Great Western Railway, 2 Hall & T. 250; 2 Mac. & G. 74.

cannot get at law what they contracted for, they may obtain compensation in damages. It is no answer to a bill for specific performance that the plaintiff may bring an action for damages for a breach of the contract, or in a proper case of a bill for discovery of some specific chattels that damages may be recovered in trover,—the language of pleading is not that the plaintiff has no remedy, but no adequate remedy save in a court of equity. It is therefore no answer in the present case, for the defendants to urge that if they or their agent have been neglectful of what they undertook to do, by which the plaintiffs have suffered, they may be liable in damage to the plaintiffs. They contracted for a specific thing, and are not bound to take that, or something in lieu of it, if such other thing be not what this court considers as a fair equivalent. I do not therefore consider that any answer is given to the plaintiffs' right to file a bill in this court by showing that the ground upon which they seek their right so to do, namely, the being barred of their legal remedy by the conduct of the defendants, may subject them to damages at law."

3. And where disputes arose between the contractor, and the company, each charging default upon the other's part, and claiming the right to occupy the works, and the workmen of both coming in collision, upon the line of the road, and the completion and opening of the road being delayed in consequence, the court, on the application of the company, restrained the contractor from *continuing on the line, or interfering with the operations of the company, but directed an account of what was due the contractor, without regard to the former certificates of the company's engineer, and an issue to try, whether the company were justified in removing the contractor, reserving all claims for loss, and compensation, till the final hearing.[3]

4. The question of the right to recover, at all at law, without procuring the engineer's estimate, where that is made a condition precedent in the contract, has been of late considerably discussed in the English courts, and especially in the important case before the House of Lords, in July, 1856;[4] and the result arrived at seems to be, that such a clause in a contract, in regard to the basis of recovery, is not equivalent to a stipulation, that

[3] East Lancashire Railway *v.* Hattersley, 8 Hare, 72.

[4] Scott *v.* Avery, 36 Eng. L. & Eq. R. 1.

no action shall be brought, or that the case shall not come before the courts of law, or equity, which has long since been determined to be repugnant and void.[5]

5. The distinction is somewhat refined, and difficult of exact definition, but it seems to us not altogether without foundation. A stipulation, that no action shall ever be brought upon a contract, or what is equivalent, that all disputes under it, shall be referred to arbitration, is a repugnancy, which if carried out literally must render the contract itself, as a mode of legal redress, wholly idle. And it is only in this view that contracts are to be considered by the courts.

6. But a stipulation that the liability under a contract, or covenant, shall not accrue, except upon the basis of certain previously ascertained facts, where the contract contains provisions for ascertaining them, by the action of either party, without the concurrence of the other, is no more than a limitation upon the right of action, as that no action shall be brought until after one year, or unless commenced within six months,[6] which have been held valid. And even where the concurrence of both parties is requisite and the performance of the condition fails, through the refusal of one, it probably is the same as to the other as if performed.

7. Hence a contract to purchase goods at the valuation of N. and M., cannot be made the foundation of an action, without obtaining the valuation stipulated, or showing that the other party hindered it.[7] And in some cases it has been held, that if the obtaining of the estimate is withheld or defeated by the fraud of *the other party, that no action at law will lie, the only remedy being by a special action for the fraud, or in equity, perhaps.[8]

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5 Thompson *v.* Charnock, 8 Term R. 139. See also Tattersall *v.* Groote, 2 B. & P. 131.

6 Wilson *v.* Ætna Ins. Co. 27 Vt. R. 99, and cases there cited.

7 Thurnell *v.* Balbirnie, 2 M. & W. 786; Milnes *v.* Gery, 14 Vesey, 400.

8 Milner *v.* Field, 5 Exch. 829. But in a later case in the same court, it is said, that the award must be obtained, or it must be shown that it is no longer practicable to obtain it. Brown *v.* Overbury, 34 Eng. L. & Eq. R. 610. This rule, with the qualification, that the defendant by his own act or refusal, had rendered the performance of the condition impracticable, is now, in this country certainly, held such an excuse, as will enable the party to sue in a court of law. United States *v.* Robeson, 9 Peters, Sup. Ct. R. 319, 326. And in a very late

8. This subject is very elaborately discussed by the judges, before the House of Lords, in the case of Scott *v.* Avery,[4] and it is remarkable how wide a difference of opinion was found to exist, upon a question, which might seem, at first blush, so simple. Of the nine judges who gave formal opinions, three were opposed to allowing any force whatever to such a stipulation. And of the other six, four held that only the question of damages can properly be made to depend, as a condition precedent, upon the award of an arbitrator, while two held that the award may be made to include all matters of dispute growing out of the contract, which it seems to us must be regarded as equivalent to saying that no action at law or in equity shall be brought to determine any controversy growing out of the contract, which all the judges agree is a void stipulation. We therefore feel compelled to adopt the view that upon principle, and the fair balance of authority, such a stipulation, in regard to estimating labor or damages, under a contract for construction, is valid, and may be treated as a condition precedent, but that beyond that, the present inclination of the English courts is to hold that it is repugnant to sound policy, and subversive of the legal obligation of the contract, as being equivalent to a stipulation that no action at law shall be brought upon the contract, but only upon the award, if not paid.

9. But the balance of authority, in this country, seems to be in favor of allowing such a condition precedent, in this class of contracts, to extend to the quality of the work, as well as the quantity, and to the question, whether the work is progressing with sufficient rapidity, and whether the company, on that account, are justified in putting an end to the contract.[8] It seems reasonable to us, on many grounds, that contracts of this magnitude and character, should receive a somewhat different interpretation in this respect, from that which is applied to the ordinary commercial transactions of the country, as has been held in regard to pecuniary penalties.[9] * We should not therefore

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case in Pennsylvania, Snodgrass *v.* Gavit, 28 Penn. St. R. 221, Mr. Justice *Woodward* assumes it as the unquestionable rule, in that state, that "where parties stipulate that disputes, whether actual or prospective, shall be submitted to the arbitrament of a particular individual, or tribunal, they are bound by their contract, and cannot seek redress elsewhere."

[9] *Ante*, § 116, 117.

feel justified in intimating any desire to see the American cases, on this subject, qualified.

SECTION XVI.

CONTRACTS FOR MATERIALS AND MACHINERY.

1. *Manufacturer not liable for latent defect in materials.*
2. *Contract for railway sleepers, terms stated.*
3. *Construction of such contract.*
4. *Party may waive stipulation in contract, by acquiescence.*
5. *Company liable for materials, accepted and used.*

§ 120. 1. In a contract for fire engines, it was stipulated, that the engines and tender should be subject to the performance of one thousand miles, with proper loads, the manufacturers to be liable for any breakage which may occur through defect of materials or workmanship, but not where it occurs from collision, neglect, or mismanagement of the company's servants, or any other cause, except the two first named. The trial to take place within one month from the day on which any engine is reported ready to start, in default of which the manufacturers to be released from all responsibility. It was specially agreed the fire-boxes should be of copper, 7-10ths of an inch thick. One of the engines, so supplied, performed the thousand miles according to the contract, but some months after, the fire-box burst, when it was discovered that the copper was reduced to 3-16ths of an inch in thickness, it being conceded it was originally of the thickness required by the contract. In an action for the price of the engine, which by the contract was to be paid upon the satisfactory completion of the trial, it was held the defendants could not give evidence of such defect in the copper, no fraud being alleged, and that, by the terms of the contract, the three months' trial having been satisfactory, released the manufacturers from all responsibility in respect of bad materials and workmanship.[1]

2. In a contract for railway sleepers,[2] it was stipulated that the plaintiff below should supply the defendant below with 350,000 sleepers, the contract before having recited that the defendants were desirous of being supplied with that number of

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1 Sharpe *v.* The Great Western Railway, 2 Railw. C. 722; 9 M. & W. 7.

2 The Great Northern Railway *v.* Harrison, 14 Eng. L. & Eq. R. 189, in the Exchequer Chamber, from the C. P.; s. c. 8 Eng. L. & Eq. R. 469.

railway *sleepers. The contract specified that the plaintiffs were willing to supply them according to a specification and tender, which stated that the number of sleepers required was 350,000, that one half would have to be delivered in 1847, and the remainder by midsummer, 1848; and the contract also contained a covenant to supply the sleepers, within the time specified, "as, and when, and in such quantities, and in such manner," as the engineer of the company by orders in writing "from time to time or at any time, within the time limited by the specification, should require." The deed also contained a provision, that the engineer might vary the time of delivery, that the company should retain in their hands £2,000, as security for the performance of the contract, and should pay it over within two months after the sleepers had been delivered, and that the contract might be determined upon the default or bankruptcy of the plaintiffs.

3. It was held that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers. That an order by the engineer was a condition precedent to any delivery of the sleepers by the plaintiffs; That the company were bound to cause such order to be given within the time limited by the specification; That although the engineer had power to alter the time for the delivery of the sleepers, such power was to be exercised within the period limited by the specification; That the engineer, as to matters in which he had a discretion, *e. g.* as to varying the time of delivery of the sleepers, stood in the position of arbitrator between the parties, but as to giving the order for the delivery he was a mere agent of the company; The only legitimate rule of construction is to ascertain the meaning, from the language used in the instrument, coupled with such facts as are admissible in evidence, to aid its explanation. — Per *Parke*, B.

4. It has been held also, in a contract with a railway company, to deliver iron, "near the months of July and August," and the delivery continuing till the 25th of October, and the company not objecting to receive it, that they were bound by the terms of the contract, one of which was that they were to give their note for each parcel of iron as it was shipped.[3]

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[3] Bailey *v.* The Western Vermont Railway, 18 Barb. 112. It was also held here, that the refusal of the company to give their notes, as stipulated, excused

*5. So too under the English statute,[4] which provides that the directors of a railway company may contract by parol, on behalf of the company, where private persons may make a valid parol contract, it was held, where the agent of the company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers, upon certain terms, the sleepers being delivered and used by the company, that they were liable.[5]

SECTION XVII.

CONTRACTS TO PAY IN THE STOCK OF THE COMPANY.

1. *Breach of such contract generally entitles the party to recover the nominal value of stock.*
2. *But if the party have not strictly performed on his part, can only recover market value.*
3. *Cash portion overpaid, will only reduce stock portion dollar for dollar.*

n. 2. *Lawful incumbrance on company's property, will not excuse contractor from accepting stock.*

§ 121. 1. In many contracts for construction, the whole, or a portion of the price, is stipulated to be paid in the stock of the company, as the work progresses, at certain stages, or when it is completed. The time, place, and mode of payment, in such cases, will be the same ordinarily as in other contracts for payment of stock. If the company refuse or neglect to deliver the stock, or the proper certificates, when it becomes due, upon proper request or opportunity, they are generally liable, it is considered, as in other cases of failure to perform contracts, for a certain amount or value, in collateral articles expressed in currency.[1]

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the plaintiff from delivering, or tendering the remainder of the iron, until the company should tender their notes, and entitled plaintiff to sue presently.

[4] 8 & 9 Vict. c. 16.

[5] Pauling *v.* London & North W. Railway, 22 Eng. L. & Eq. R. 560. The contract was made by the engineer's clerk, who was also clerk of the company, but there was evidence of the assent of the committee. Lowe *v.* London & North W. Railway, 14 Eng. L. & Eq. R. 18.

[1] Moore *v.* Hudson River Railway, 12 Barb. 156. It was held, in this case, that where a portion of the price of construction was payable in stock, at par, within thirty days after the completion of the contract, that the company were not bound to make any tender of the stock, as in case of contracts for specific articles. But that it was a payment in depreciated currency, and no tender necessary.

2. But it was held that where the plaintiff recovered a balance due on equitable grounds, and not on the ground of strict and full performance of the contract, he was precluded, on like equitable *grounds, from recovering more for the stock portion of the contract than its market value, at the commencement of the action.[2]

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[2] Barker *v.* T. & R. Railway, 27 Vt. R. 766. In this case the court say: "If the defendants have, upon reasonable request, declined paying the amount due, in their stock, as stipulated, it would seem but reasonable they should pay the amount in money.

"1. This is the general rule in regard to contracts payable in collateral articles, estimated in currency, and not delivered.

"2. The stock of a corporation is but a certificate of such a sum being due the bearer. And when the party stipulated to pay in his own paper, if he refuse, suit may be brought immediately, although the paper was to have been on time, if given. But it was never supposed the party could reduce the recovery, by showing his paper depreciated in the market. This would be virtually giving the difference to the other stockholders. This would be the rule which should be applied if defendants are wilfully in fault. If it were the stock of another company, no doubt, all which could be recovered is the value of the stock in the market. Certainly, this is the general rule, in regard to stock. And, perhaps, that rule should be applied to the stock of the defendants, if it appears they have not wilfully and unreasonably refused to deliver the stock. *Ante*, § 38.

"But the recovery here is not allowed upon strictly legal grounds, upon the strict and literal performance of the contract on the part of the plaintiffs. It is rather upon equitable grounds, that any recovery and apportionment of the contract is allowed for any thing less than full performance. By the terms of the contract the defendants had a right to retain the tenth part reserved until full performance. And, although it has not been regarded, as a strict condition precedent in some of the cases, (Danville Bridge Co. *v.* Pomeroy, 15 Penn. 151,) still it is a stipulation in the contract for the full performance of which the defendants had the right to insist, and for doing which they are not to be themselves regarded as in fault. The defendants, too, were justified in refusing to pay any deficiency in the work at the time of the demand; so that while we excuse the plaintiffs from full performance of their contract, as a strict condition precedent, and allow them to recover to the extent of what they had done, on the equitable ground that they had in good faith attempted to fulfil their undertaking, and supposed they had done so, and only failed by mistake and misapprehension, which should not, under the contract defeat the recovery *in toto*, but only subject it to an equitable deduction for all damage sustained by defendants, it seems to us that it should form a part of this equity to the defendants, not to be required to pay more for this stock, even if it were their own, than it was in fact worth, or could have been made to benefit the plaintiffs.

"As we now hold, the plaintiffs were, at the time of the demand, entitled to recover, upon equitable grounds, a sum less than the whole price. But they demanded the whole price, and the defendants refused. The demand itself was

*3. So, too, where the work is to be paid, partly in stock and partly in money, if the money part be overpaid, even by doing a

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unreasonable. Is it certain a reasonable one would have met a similar fate? It has been held the demand must be reasonable, to render the refusal unreasonable. Jameson *v.* Ware, 6 Vt. R. 610. As, therefore, the refusal of defendants seems to have been not altogether without good excuse, and in allowing an equitable recovery, in a case like the present, one of the first requirements seems to be, that no injustice shall be thereby visited upon defendants, it would almost necessarily follow that we should not suffer the plaintiffs to recover more for the work really done by them, than they could possibly have realized, if they had been paid at the time, according to the contract. And, as we set up a basis of recovery upon equitable grounds, and one not contemplated in the contract, we should not visit the defendants with a judgment which will make them worse off than if they had been allowed to pay the sum found to be due upon this equitable basis, after it is declared, according to the stipulations of the original contract. If this view is sound and equitable, and we see no reason to doubt it, the plaintiffs, as to the stock portion of their judgment, are entitled to the highest price the stock bore after the suit was commenced, and before the final judgment, or, if they choose, the court will strike out that portion of the amount reported, and require the certificates of stock still to be delivered; and if defendants refuse, on reasonable request, enter up judgment for the full amount." But if the contractor perform extra work he is entitled to recover for that, in money, upon an implied promise, notwithstanding by his contract he was to accept part of his pay in stock, for all work done under the contract. Childs *v.* Som. & Ken. Railway, Cir. Ct. U. S. Maine District, May 1, 1857. 20 Law Rep. 561. In the case of Cleveland & Pittsburgh Railway *v.* Kelley, 5 Ohio St. R. 180, it is held that where one fourth of the amount due the contractors is to be taken in the stock of the company, and the company refuse to deliver the stock on request, they are only liable for the market value of the stock at the time it should have been delivered. The court profess to base their opinion upon the ground that in contracts of this character there is not understood to be any election reserved by the company to pay either in their stock, or in money, but that it is an absolute undertaking to deliver so much stock as shall, at its par value, be equal to one fourth the amount due the contractor. It does not readily occur to us how this relieves the question from the apparent violation of principle, in allowing the company to refuse to give certificates of their own stock which they have contracted to do, and at the same time pay less than its par value. It is in ordinary cases equitable no doubt, and always where the refusal is upon the ground that nothing is due the contractor. *Ante*, § 121, n. 2.

The point of the decision is thus summed up by Mr. Justice *Swan*. "For these reasons we are of the opinion that no such election was contemplated by either of the parties when the contract was entered into; that the law relating to trade notes and contracts of a like kind, has no application to the agreement between these parties; that it was an exchange of work for stock, in which monetary terms were necessarily used, not for the purpose of expressing real values, but as the only mode of expressing quantities and proportions; that the fourth to be

portion of the work, which the party reserved the right to do, in order to hasten the work, it will only reduce the stock payment, dollar for dollar, and not according to the market value of the stock at the time.[3]

*SECTION XVIII.

TIME AND MODE OF PAYMENT.

1. *No time specified, payment due only, when work completed.*
2. *Stock payments must ordinarily be demanded.*
3. *But if company pay monthly, such usage qualifies contract.*
4. *Contract to build wall, by cubic yard, implies measurement, in the wall.*

§ 122. 1. Where no time of payment is specified, in terms, in

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taken in stock was not a money indebtedness, but a stock indebtedness; and, consequently, that the company could derive no benefit from the increased value of the stock, and could suffer no loss by its depreciation; the damages which the contractors suffered from the non-delivery of the stock being its market value."

See also Boody *v.* Rut. & Bur. Railway, (Cir. Ct. U. S.) 24 Vt. R. 660. In this case it was held, that the defendants having given their creditors a mortgage upon their road, after the contract with the plaintiff, did not excuse him from accepting the stipulated proportion of the payments in stock.

Nor can the contractors, in such case, refuse to receive the stock, because the legislature, in the mean time altered the charter of the company, by which the capital stock and debt of the company were increased; nor because the company voted not to pay interest on the stock, in money, as they had before done, it not appearing that the value of the stock had been affected by either. Moore *v.* Hudson River Railway, 12 Barb. 156.

And where the company, in settlement with a contractor, agreed to pay him a certain amount, in stock, or the bonds of the company, at his election, the company retaining the same as security for certain liabilities on account of the contractor, and gave the contractor a certificate of such stock, with an agreement indorsed, to exchange it for bonds, at his election, and the certificates were then returned to them, as their indemnity; it was held, that the company were bound to deliver the bonds, notwithstanding the treasurer had entered the shares in the books of the company, as the property of the contractor, and they had in consequence been sold upon execution against him. Jones *v.* Portsmouth & Concord Railway, 32 N. H. R. 544.

A contractor, who agrees to take a portion of his pay in the bonds of the company, has no such interest in any question, in regard to their validity, as will prevent a court of equity from enjoining those of a county, which had been delivered to the company without a proper compliance with the conditions of the statute, under which the subscription was made, the contractor having had knowledge of the facts, from the first. Mercer County *v.* Pittsburgh & Erie Railway, 27 Penn. R. 389.

[3] Jones & Dow *v.* Bradley, 29 Vt. R.

the written contract, between the parties, for the construction of a portion of a railway, it was held, that, looking to the contract alone, the contractor could not call for payment, either of the cash, or stock portion of the contract, until a complete performance of the contract on his part.[1] Or upon the most favorable construction, until some distinct portion of the work, for which the contract fixed a specific price, was accomplished.[1]

2. In regard to the stock portion of the payments, a special demand was necessary, before the contractor can maintain an action for it.[1]

3. But where it appeared, that the company were accustomed to make monthly payments to their contractors, upon the estimates of the engineer, at the end of each month, and that they had so dealt with the plaintiff, it was held that this must be considered the rule of payment, under the contract, established by mutual consent, and binding upon the parties.[1]

4. A contract to build "riprap" wall for fifty cents a cubic yard, in the absence of proof of any general usage, or uniform custom, which could control the mode of measurement, was held to imply payment, by the cubic yard, after the wall was constructed.[2]

*SECTION XIX.

REMEDY ON CONTRACTS FOR RAILWAY CONSTRUCTION.

1. *Recovery on general counts.* | 2. *Amount and proof governed by contract.*

§ 123. 1. It is a familiar principle of law, applicable to contracts, for the performance of work and labor, that if the work is done, so that nothing more remains, but payment, there is no necessity of declaring specially upon the contract, but the recovery may be had, under the general counts; and it will make no difference, in this respect, that it was not done within the time prescribed by the contract, if the work has been accepted by the other party, or the time for performance extended, by such party, or the work has been done upon some permanent property of the other party, as in the case of building a railway.[1]

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1 Boody *v.* Rut. & Bur. Railway, 24 Vt. R. 660, (U. S. Cir. Ct.)

2 Wood *v.* Vermont Central Railway, 24 Vt. R. 608.

1 Merrill *v.* Ithaca & Owego Railway, 16 Wendell, 586; s. c. 2 Am. Railw. C. 421.

2. But ordinarily the contract will govern, as to price, and other incidents, so far as it can be traced. But where the party, for whom the labor is performed, wilfully hinders and obstructs the progress of the work, it has been held he was liable, as upon a *quantum meruit*.[1] But in such case the party must prove the performance of the labor, by such proof, as would be competent, in an action on the special contract, and cannot treat the dealing, as if it had been matter of account, from the first.[1]

SECTION XX.

MECHANIC'S LIEN.

1. *Such lien cannot exist in regard to a railway.*
2. *Opinion of* Scott, J.

§ 123 *a*. 1. It has been considered, that although a public railway may come within the literal import of the terms used in a statute, to secure material-men, and laborers, by what is denominated a mechanic's lien, upon "buidings or other improvements," yet that the public have such an interest, in public works of this character, that it cannot reasonably be presumed, that such terms were intended to include the bridges and culverts upon the line of a public railway.[1]

2. The language of *Scott, J.*, shows the ground of the decision. "Although railway companies, in some respects, resemble private corporations, yet, as they are organized for the public benefit, the state takes a deep interest in them, and regards them as matters of public concern. The establishment of this railway is regarded as a public work, established by public authority, intended for the public use and benefit." The learned judge argues that such a lien, to be effectual, must be liable to defeat the object of the work, and therefore, and as the legislature have provided a specific remedy for laborers, it is not to be supposed that a mechanic's lien also exists, in regard to the structures on the works.

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[1] Dunn *v.* North Missouri Railway, 24 Mo. 493.

*CHAPTER XVI.

COMMON CARRIERS.

SECTION I.

DUTY AT COMMON LAW.

1. *Inevitable accident.*
2. *To excuse carrier, force must be above human control, or that of public enemy.*
3. *Are insurers against fire, except by lightning.*
4. *Instances of perils which excuse carrier.*
5. *If carrier expose himself to perils, he must bear the loss, but not of delay, from unknown peril.*
6. *Is liable for loss in price, during delay, caused by his fault.*

§ 124. 1. CARRIERS of goods for hire indifferently for all persons, at common law, were denominated common carriers, and for a very long time, have been held liable for all damage and loss to goods, during the carriage, from whatever cause, unless from the act of God, which is limited to inevitable accident, or from the public enemy. The exception of the act of God, or inevitable accident, has by the decisions of the courts, been restricted to such narrow limits, as scarcely to amount to any relief to carriers. It is in reality limited to accidents, which come from a force, superior to all human agency, either in their production, or resistance. Hence many learned judges have contended, that the terms, inevitable accident, which were first suggested by Sir William Jones, as a more reverent mode of expressing the act of God, do not, in fact, have the same import.[1]

[1] Forward *v.* Pittard, 1 Term R. 27. The language of Lord *Mansfield* is here so pertinent as to bear repetition: "It appears from all the cases for one hundred years back, that there are events, for which the carrier is liable, *independent of his contract.*" "A carrier is in the nature of an insurer." In defining the act of God, he says: "I consider it to mean something in opposition to the act of man." "The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests." McArthur *v.* Sears, 21 Wend. 192; Proprietors of the Trent & Mersey Nav. Co. *v.* Wood, 3 Esp. Cases, 127, 131; 4 Doug. R. 287, (26 Eng. C. L. R. 358). Lord *Mansfield* here says: "The act of God is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident."

*2. To excuse the carrier, the loss must happen from a strictly superior force, and not a mere human force, (unless it be the public enemy,) the *vis major* of the civil law, and the casuists. And it would seem that it should not only be a superior force, in the emergency, but one, which no human foresight or sagacity could have guarded against.[2]

3. Hence, carriers are held as insurers against fire, unless caused by lightning.[3] There are many cases in the books, which take such a latitudinarian, or speculative view, of the extent of injuries, by the act of God, as to give the exception a much broader range, as where the foundering of a ship upon a rock in the ocean, not generally known to navigators, and not known to the master, was held a loss from the act of God.[4]

4. Or the loss of a vessel by running upon a snag in a river, brought there by a recent freshet.[5] But these cases have not been generally followed. A hurricane, or tempest, lightning, and the unexpected obstruction of navigation by frost, have been held to come within the exception to the liability of carriers.[6]

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[2] Colt *v.* McMechen, 6 Johns. R. 160, opinion of *Kent*, Ch. J.; 1 Smith's L. Cases, 219, ed. 1847, 268, ed. 1852, and the able note of the Am. editor; McArthur *v.* Sears, 21 Wend. 190; McCall *v.* Brock, 5 Strob. 119; Dale *v.* Hall, 1 Wilson, R. 281; N. B. Steamboat Co. *v.* Tiers, 4 Zab. 697.

[3] Mersham *v.* Hobensack, 2 Zab. 273, 389; Forward *v.* Pittard, 1 Term R. 27; Hyde *v.* Trent & Mersey Nav. Co. 5 T. R. 389; Gatliffe *v.* Bourne, 4 Bing. N. C. 314. And in Ins. Co. *v.* Ind. & Cin. Railway, 9 Am. Railw. Times, Aug. 13, 1857, it is held that in losses by fire, the carrier is *primâ facie* liable. (Sup. Ct. Ohio.)

[4] Williams *v.* Grant, 1 Conn. R. 487.

[5] Smyrl *v.* Niolon, 2 Bailey, 421; Faulkner *v.* Wright, 1 Rice, 108.

[6] Bowman *v.* Teall, 23 Wend. 306; Parsons *v.* Hardy, 14 id. 215; Harris *v.* Rand, 4 N. H. 259; Crosby *v.* Fitch, 12 Conn. R. 410. It has been held, that although a general bill of lading, given by a carrier, containing a general undertaking to carry, is subject to the ordinary exception to the liability of the carrier, of the act of God and the public enemy, it may nevertheless be shown, by oral testimony, that the undertaking was not even subject to that exception. Morrison *v.* Davis, *infra*. But, query, whether this legal intendment of the bill of lading is any more subject to explanation and contradiction, than are the express provisions of the instrument itself.

Loss by pirates is regarded as a loss by the public enemy. Magellan Pirates, 25 Eng. Law & Eq. 595. So where goods are thrown overboard, in a tempest, by order of the master. Gillett *v.* Ellis, 11 Ill. 579. The master of a steamboat is not liable, for not drying wheat wet by inevitable accident. Steamboat Lynx *v.* King, 12 Mo. R. 272.

*5. And ordinarily, where the negligence of the carrier exposes him to what he might otherwise have escaped, he is responsible for losses thus occurring, through the combined agency of his own negligence, and inevitable accident, or the public enemy. But if his own neglect was not the proximate cause of the peril being incurred, or one which ordinary foresight or sagacity could have apprehended, was exposing the goods, to extraordinary peril, he is still excused. As if by having a lame horse, he is longer upon his route, and is thus overtaken by a desolating flood upon the canal.[7]

6. But where a delay in the transportation is caused by the act of God, a railway is liable for injury to the goods, by bad handling, in endeavors to expedite the passage. But they are not liable, of course, for a decline in the price of goods, during a delay which was inevitable.[8] But where the decline in price happened during a delay in transportation, for which there was no legal excuse, the carrier would, no doubt, be liable. And in an action for not delivering goods in a reasonable time, the party is entitled to recover the value of the goods, at the time and place where they should have been delivered, and necessary loss and expenses incurred otherwise, if any.[9]

SECTION II.

RAILWAY COMPANIES COMMON CARRIERS.

1. *Common carriers, those who carry for all who apply.*
2. *Under the English statute entitled to notice of claim.*
3. *Railways liable, as common carriers of passenger's boggage, and of freight.*

§ 125. 1. It was decided, at an early day, that persons assuming to carry goods upon railways for all who applied, were to be

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[7] Morrison *v.* Davis, 20 Penn. R. 175.

[8] Lipford *v.* Railway Co. 7 Rich. 409. And when the cause of delay, as ice, or low water, is removed, the duty to transport revives. Lowe *v.* Moss, 12 Ill. 477; *post*, § 148.

[9] Nettles *v.* Railway Co. 7 Rich. 190; Black *v.* Baxendale, 1 Exch. 410; *post*, § 148.

Where cotton is lost by a common carrier, interest upon its value may be assessed by the jury as part of the damages, in an action against the carrier for the loss. Kyle *v.* Laurens Railway, 10 Rich. (s. c.) R. 382.

held as common carriers, and it is now regarded as an elementary *principle in the law, that all who carry goods, for all who apply, are common carriers.[1]

2. Some of the English statutes require notice of any claim against railway companies, for default in any undertaking under

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In estimating the damages in an action against the carrier for the loss of the cotton which he undertook to deliver to plaintiff's factors in Charleston, the amount of factor's commissions upon the value should not be allowed the defendant in abatement. Id.

[1] Parker *v.* Great Western Railway, 7 Man. & G. R. 253; Muschamp *v.* Lancaster Railway, 8 M. & W. 421; Palmér *v.* Grand Junction Railway Co. 4 M. & W. 749; Pickford *v.* Grand Junction Railway, 12 M. & W. 766; Eagle *v.* White, 6 Whart. R. 505; Weed *v.* S. & S. Railway Co. 19 Wend. 534; Camden & Amboy Railway Co. *v.* Burke, 13 id. 611; Story on Bailments, § 500; Angell on Carriers, § 78. In the case of Fuller *v.* The Naugatuck Railway, 21 Conn. R. 570, it is said that in order to charge railways, as common carriers, it is not necessary to allege, that they had power under their charter to become common carriers, but that having assumed the office and duty of common carriers of freight and passengers, they are thereby estopped to deny their obligations, therefrom resulting, by falling back upon any limited construction of their powers under their charter. The same rule of construction, in regard to the liabilities of railways was adopted in Welling *v.* The Western Vermont Railway, 27 Vt. R. 399, and in Noyes *v.* The Rutland & Burlington Railway, 27 Vt. R. 110. The citation of cases under this head might be multiplied almost indefinitely. In Jones *v.* Western Vermont Railway, 27 Vt. R. 399, it is laid down, as the governing principle of the case, that the company are liable even for torts, committed by their agents, or servants, within the apparent scope of their authority, or in the pursuit of the general purpose of the charter, and where the departure from the general scope of the charter powers is not such as to be notice to all, that the agent is departing from the proper business of the corporation. Two of the three last were cases where the railway company so constructed an embankment, as to serve the purpose of a dam, to create a reservoir for the accommodation of the mill-owners below, whereby the company obtained some advantage in regard to compensation to land-owners, through whose land they were constructing the embankment. The embankment was so defectively constructed, that it yielded to the pressure of the water, and caused damage to the proprietors below, by the sudden outbreak of the waters, and the company were held liable for the injury thereby sustained.

In England, it is not uncommon to convert railway structures, by means of additions, into stables, and even dwelling-houses, which the company let to tenants. Such buildings, although subject to the poor-rate, are not regarded as under the supervision of the Metropolitan surveyors of buildings, as to fire, party-walls, roofs, and the right to order buildings pulled down, forming, as they do, an important and indispensable portion of the railway structures. North Kent Railway *v.* Badger, 30 Law Times, 285. Russell *v.* Livingston, 19 Barb. 346.

their charters, before suit brought. But, under such statutes, it has been held, that no such previous notice is necessary, where the act complained of is negligence in carrying goods or passengers, this not being a suit for any thing done under the act, within the meaning of the statute requiring notice.[2] But it is held that where the action was brought to recover the excess of charges, for carrying goods, above what was charged others for similar service, the company were entitled to notice of the claim, before action.[3]

3. By the English statute, the Railways Clauses Act, railways, stage-coach proprietors, and other common carriers of passengers, * their baggage and other freight, are put upon precisely the same ground both as to liability, and as to any protection, privilege, or exemption. The same rule obtains in this country, except, perhaps, that inasmuch as this mode of transportation is infinitely more perilous to the lives of passengers, a proportionate degree of watchfulness is demanded of the carriers of passengers in this mode. But this is but extending a general principle of the law to this particular subject, to wit, that care and diligence are relative terms, and the degree of care and watchfulness are to be increased in proportion to the hazard of the business.[4]

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[2] Carpue *v.* The London & Brighton Railway Co. 5 Q. B. 747; Palmer *v.* Grand Junction Railway Co. 4 M. & W. 749.

Proof of the delivery of goods to a common carrier, and of a demand and refusal of the goods, or of their loss, throws upon the carrier the burden of showing some legal excuse. Alden *v.* Pearson, 3 Gray, 342.

[3] Kent *v.* The Great Western Railway Co. 4 Railw. C. 699. This action is similar to Parker *v.* Great Western Railway Co. 3 Railw. C. 563. In these cases, it was held, the taking of tolls is an act done in the execution of their charter powers.

[4] Commonwealth *v.* Power, 7 Met. 601; Jencks *v.* Coleman, 2 Sumner, 221; Camden & Amboy Railway *v.* Burke, 13 Wend. R. 611; Pardee *v.* Drew, 25 Wend. 459. Carriers from places within the realm, to places without, are subject to the same liability, as carriers who carry only within the realm. Crouch *v.* London & North W. Railway, 25 Eng. L. & Eq. R. 287.

The duty of common carriers is independent of contract. Pozzi *v.* Shipton, 8 Ad. & Ellis, 963; 1 P. & D. 4; 1 W. W. & H. 624; Bretherton *v* Wood, 3 Bro. & B. 54. In both these cases, it is held the action may be in tort as well as in contract, there being no necessity of any special undertaking, a general duty to carry safely resulting from the very office of a common carrier. Therefore, a verdict may pass against some defendants and not against all, where the declaration is, in form, *ex delicto*.

SECTION III.

LIABILITY FOR PARCELS CARRIED BY EXPRESS.

1. *Carriers, who allow servants to carry parcels, are liable for loss.*
2. *Importance of making railways liable for acts of agents.*
3. *Allowing perquisites to go to agents will not excuse company.*
4. *Owner of parcels, carried by express, may look to company.*
5. *May sue subsequent carrier, who is in fault.*
6. *European railway companies are express carriers.*

§ 126. 1. It may perhaps be assumed, that upon general principles, common carriers, who allow their servants, as the captains of steamboats, and the conductors of railway trains, to carry parcels, are liable for their safe delivery, whether they themselves derive any advantage from the transactions or not. Our own views, upon this subject, were expressed in a late case:[1]—

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[1] Farmers & Mechanics Bank *v.* The Champlain Transportation Co. 23 Vt. R. 186. But it is said in some of the elementary writers, and by some judges, that if such servant is allowed to do this, as a mere gratuity to him of the perquisites, and this is known to those who employ him, his principals are not liable for his default. 1 Parsons on Cont. 656; King *v.* Lenox, 19 Johns. R. 235. This was a case where the owner of the ship freighted her himself, and the master had no authority to take freight from others, and this known to those who employed him. Walter *v.* Brewer, 11 Mass. R. 99; Reynolds *v.* Tappan, 15 Mass. R. 370; Butler *v.* Basing, 2 C. & P. 613. But see the opinion of the court in 23 Vt. R. 203, upon this point, where it is said: "It seems to us that this case is distinguishable from those, where it has been held incumbent upon the plaintiffs to show, by positive proof, that the company consented to the captain of their boat carrying money *on their account*, in order to hold the company responsible for the loss of the money. Sewall *v.* Allen, 6 Wend. 351, reversing the judgment in Allen *v.* Sewall, 2 Wend. 327, is one of that class of cases, so far as the determination of the Court of Errors is concerned. And that determination seems to meet with approbation in Angell on Carriers, § 101, and note 4. And Story, J., in Citizens' Bank *v.* Nantucket, S. B. Co. 2 Story's R. 16, and Chancellor *Kent*, 2 Kent, 609, seem also to approve the decision of the Court of Errors. But these cases, and the writers named, adopt this view of the subject, upon the ground that the charter of the company limits their business to the carrying of "goods, wares, and merchandise," and that bank-bills are neither, and so the company *primâ facie* are not liable; and not liable in any event, unless they have given their consent to their proper business being enlarged, so as to include bank-bills, and also that this was a suit against the stockholders in their individual capacity, under the charter. Upon this narrow view of that case, the decision of the Court of Errors may stand; but, as applicable to a company, whose charter, on the face of it, does include the carrying of bank-bills, and in a

*"It seems to us, that when a natural person, or a corporation whose powers are altogether unrestricted, erect a steamboat, appoint a captain, and other agents, to take the entire control of their boat, and thus enter upon the carrying business from port to port, they do constitute the captain their general agent, to carry all such commodities as he may choose to contract to carry within the scope of the powers of the owners of the boat. If this were not so, it would form a wonderful exception to the general law of *agency, and one in which the public would not very readily acquiesce.

2. "There is hardly any business in the country where it is so important to maintain the authority of agents, as in this matter of carrying, by these invisible corporations, who have no local habitation, and no existence, or power of action, except through these same agents, by whom almost the entire carrying business of the country is now conducted. If then the captains of these boats are to be regarded as the general agents of the owners—and we can hardly conceive how it can be regarded otherwise—whatever commodities, within the limits of the powers of the owners, the captains, as their general agents, assume to carry for hire, the liability of the owners, as carriers, is thereby fixed, and they will be held responsible for all losses; unless, from the course of business of these boats, the plaintiffs did know, or upon reasonable inquiry, might have learned, that the captains were intrusted with no such authority. *Primâ facie* the owners are liable for all contracts for carrying made by the captains, or other general agents for that purpose, within the powers of the owners themselves, and the *onus* rests upon them to show, that the plain-

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suit directly against the corporation, it seems to us the reasoning is altogether unsatisfactory and unsound. And unless that case is to be distinguished from the present, upon the ground of the restricted nature of the charter of that company, we should certainly incline to the opinion of the Supreme Court of New York, in Allen *v.* Sewall, rather than that of the Court of Errors. Mr. Justice Story, (in 2 Story, *ut supra*,) seems to admit, that, upon general principles, the captain's contract will bind the company to the extent of the charter powers."

But see Chateau *v.* Steamboat St. Anthony, 16 Mo. 216. Where the clerk of a steamboat carried money letters, as a mere gratuity, it was held, that this did not render the proprietors of the boat liable, as common carriers, but only, as gratuitous bailees, for loss by gross neglect. Haynie *v.* Warring & Co. 29 Alab. R. 263. But the rule in the text is maintained, in Mayall *v.* Boston & Maine Railway, 19 New H. R. 122. See the opinion of *Gilchrist*, Ch. J., in the last case.

tiffs had made a private contract with the captain, which it was understood should be kept from the knowledge of the defendants, or else had given credit exclusively to the captain. Butler *v.* Basing, 2 C. & P. 613.

3. "But it does not appear to us that the mere fact, that the captain was, by the company, permitted to take the perquisites of carrying these parcels, will be sufficient to exonerate the company from liability. Their suffering him to continue to carry bank-bills ought, we think, to be regarded as fixing their responsibility, and allowing the captain to take the perquisites, as an arrangement among themselves. But we are aware, that the question, with whom was the contract, and to whom the credit was given, will generally be one, to some extent, of fact."

4. And the general law upon this subject is well stated, by the highest tribunal in the country, in an important case, by Mr. Justice *Nelson*.[2] In this case it was considered, that the owner of parcels carried, by express, might look to the responsibility of the company, as common carriers, treating the express company, as the agents of the owners of property carried, and that they were entitled to sue in their own names, upon any contract, express or implied, existing, in relation to the things carried, between the express company and the principal carriers.

5. It is upon the same principle that the owner of goods, is allowed to sue any of the subsequent carriers in the line of transportation, guilty of a default in duty, although his contract was made with the first carrier, to whom he delivered the goods.[3] This is indeed but a general principle of the law of contracts, familiar to every lawyer.[4]

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[2] New Jersey Steam Nav. Co. *v.* The Merchants Bank, 6 Howard's R. 344.

[3] Sanderson *v.* Lamberton, 6 Binney's R. 129.

[4] Lapham *v.* Green, 9 Vt. R. 407; Young *v.* Hunter, 4 Taunt. 582; Paterson *v.* Gandasequi, 15 East, R. 62; *Denman*, Ch. J., in Sims *v.* Bond, 5 B. & Ad. 389. But see Weed *v.* S. & S. Railway, 19 Wend. 534, where the principals, it is said, cannot sue on a contract made with their agent to carry his trunk and money for expenses, if the trunk is not their property, but borrowed by the agent. In Stoddard *v.* Long Island Railway, 5 Sand. 180, it was held that the owners of the goods were bound, by any special contract, between the agents for forwarding, and the company upon whose trains the goods were forwarded. In Steamboat Co. *v.* Atkins & Co. 22 Penn. 522, it was considered that the forwarding merchant had such an interest in a contract made by him for forwarding goods, that he might maintain an action in his own name, for a violation of it. But see King *v.*

6. In England and upon the continent, it is the practice for the companies themselves to carry parcels, by express, which is here done by others chiefly, under contracts with the company.

SECTION IV.

RIGHTS AND DUTIES OF EXPRESS CARRIERS.

1. *Liable for not making delivery to consignee.*
2. *Contract of company with local carriers only temporary.*
3. *Cannot charge in proportion to value of parcels, and restrict their liability.*
4. *Not responsible beyond their routes.*
5. *Company, where statute prohibits discrimination, cannot charge express carriers higher than others, or give one such carrier exclusive privileges.*

§ 127. 1. This is a mode of transportation which has come in practice very much, since the general use of railways for transportation. * It seems more necessary on account of the rapidity of movement upon such roads, and also the mode in which business is generally transacted by railway companies of only delivering at their stations. Express companies, and agents, as far as we know, receive parcels at their offices, not only at their principal *termini* in the large towns and cities, but at local offices along the line of their routes, and even send their wagons about the cities and towns, to gather up parcels when notified to do so, and adopt a similar course in delivering out parcels at the doors of the dwellings, or places of business, of the consignees. This mode of transacting the business of expresses seems to come in the place of the general carrying business of parcels;[1] or, accord-

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Richards, 6 Whart. 418; opinion of *Fletcher*, J., Robinson *v.* Baker, 5 Cush. R. 145. See in confirmation of the rule laid down in the text, Langworthy *v.* New York & New H. Railway, 2 E. D. Smith, 195.

But in order to charge the carrier by a delivery to the servant, it must appear, that it was the business, or at least the practice of the servant to receive such parcels for carriage, or the carrier is not liable. Blanchard *v.* Isaacs, 3 Barb. 388.

[1] In a recent case in South Carolina, Stadhecker *v.* Combs, 9 Rich. 193, which was a suit against an express company, for the value of a trunk, lost by them, it is said: "A strict application of the law of common carriers is necessary for the protection of the large amount of property committed to the hands of strangers, for transportation to distant points, and certainly, from such an application, express companies have no claim to exemption." And in Sweet *v.* Barney, 24 Barb. R. 533, it was held, that the party, to whom money was sent by express, might direct the place and mode of delivery. Hence, a bank in the city, to whom

ing to the definition of the English Carriers' Act, of things of great value in small compass. And there can be no question that, upon general principles, these expresses are liable as common carriers, and liable, according to the course of their business, and the expectation thereby created in the mind of their employers, for all parcels received into their wagons, and bound to make personal delivery to the consignees or to their agents, at

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money is sent by bankers in the country, by express, being considered the owner of the money, may authorize the same to be delivered at the office of the express company, or at any other place in the city, to any person it may select; and the express company, by making such a delivery, will be relieved of their responsibility, whether it be that of common carrier or forwarder. All the express company is bound to do, in such cases, is to make such a delivery as will charge the consignee. In the absence of all special provision, in such cases, it is the duty of the express agent to deliver the money at the bank, to the proper officer. And where it is the practice of such companies to deliver packages, according to their address, it will be presumed that they assume to deliver all packages committed to their custody in that mode. And in such case, the only delivery, which will charge the bank or release the express, is a delivery according to the address of the parcel, at the bank, to the proper officer.

But where the express delivers the money to a porter, at their office, who had usually been employed by the bank to receive such packages for them, it is not sufficient to discharge the express, unless such delivery was authorized by the bank; and it is incumbent upon the express to prove such authority in its own discharge. This proof may be direct and express, or implied from the acts of the porter, such as receiving money for the bank on other occasions at the express office, sent to it in a similar way, and a similar address, with the one in question, and with the knowledge and assent of the bank, provided the testimony is sufficient to satisfy the triers of the fact, that the bank authorized the porter to receive the money on their behalf, or that from the manner in which they allowed him to conduct business on their behalf, they were bound to suppose others might understand that he was authorized to so act on their behalf, and that the express company did so understand it.

The Am. Railw. Times, Feb. 1858, speaks of a newspaper report of a recent decision in Wisconsin, wherein it was held that a tender of money carried by express, at the bank, at any time, although not in banking hours, will discharge the company from their responsibility as common carriers, and from all liability, the money having been stolen from their safe during the following night, without their fault. There is probably some misapprehension in regard to the point upon which the case was decided; for a tender at a bank, out of known and recognized banking hours, is obviously no tender at all. One might as well make a tender to a merchant at midnight, after the store was closed. But it was held that a tender, after sundown, if made personally to the party, at his place of business, is good. Startup *v.* Macdonald, 6 M. & G. 593. So, too, a tender at a bank, while open and the officers in, might be good, although after banking hours.

their places of business, or, in default of having such, at their residences. And since the establishment of such expresses, it will be presumed that one who expects a parcel to be delivered personally, or notice given to the consignee, will intrust it only to the express upon the route, and his giving it in charge of the general freight agent of the railway, is equivalent to an express contract, almost, that the company shall only be bound to such a delivery, as is according to their general course in this department of their business. For, by delivering the parcel to the express, the owner not only secures the responsibility of the express company or agent, but also of the railway company, unless they have stipulated with the express for some exemption from their ordinary common-law liability as carriers, in the transportation of the business of the express, and this is made known to the owner of goods so sent. These propositions result from the elementary principles of the law of bailment, and are recognized by the best considered cases.[2]

*2. It was held, in a recent case,[3] in the English Court of Exchequer, that a contract between a railway company and an individual, that he should, for a twelvemonth, carry all grain, merchandise, &c., between certain points to and from the railway, at a given price, he providing wagons, horses, drivers, tarpaulins, and other plant necessary for the cartage, and agreeing to be responsible for all money due to the company for the carriage of goods carted by him for such persons as had not ledger accounts with the company, and to observe all the regulations of the company, might be terminated, at any time, by the company, even after such person had provided himself with the requisite furniture to carry the contract into effect, and entered on its performance ; the railway having, in the mean time, made an arrangement with another railway, by which cartage between these points, became unnecessary.

3. Where an express company restricted their liability in the

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2 N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344.

3 Burton *v.* The Great N. Railway, 25 Eng. L. & Eq. 478. But the verdict in this case, at the trial before *Martin*, B., was for the plaintiff on the ground that the company impliedly bound themselves not to do any thing, during the term the contract was to run, to deprive the plaintiff of the ordinary cartage between those points. And it seems to us the decision of Baron *Martin* is quite as satisfactory as that of the full bench.

receipt given for a package of bonds, with coupons attached, valued at $40,000, and charged, for carrying, a very high rate in proportion to the size or weight of the package, even beyond the usual rate of insurance, it appearing that no extraordinary care was bestowed on parcels of high value, it was held that there was no reason for enhancing the charge for transportation in proportion to the value of the articles carried, and that the charge was exorbitant and unreasonable.[4]

4. Express carriers who take parcels marked for points beyond their route, and where they have no agents, are only bound, as common carriers, to carry safely to the end of their route, and deliver to the usual conveyance from such point to the place of destination.[5] They may restrict their liability by express contract.[5]

5. Where the statute requires a railway company to carry for all who apply, and upon equal terms, they have no right to impose increased prices upon express carriers who send freight by the company's trains, in aggregate quantities, made up of small parcels, *directed to different persons.[6] Nor can railways impose their own terms for freight by including an extra and unreasonable charge for the receipt and delivery of freight and parcels, about the towns, adjoining the stations.[6] So, too, a contract giving the exclusive privilege to one express company of transportation in the passenger trains is illegal and void, being in contravention of the statute requiring equal privileges, and equal charges, to all.[7]

SECTION V.

RESPONSIBILITY FOR BAGGAGE OF PASSENGERS.

1. *Liable as common carriers for baggage.*
2. *Liability where different companies form one line.*
3. *Company liable for actual delivery to the owner.*
4. *Company not liable unless baggage given in charge to their servants.*
5. *Liability results from duty, and not from contract.*

§ 128. 1. It is an elementary principle in the law, that the

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[4] Holford *v.* Adams, 2 Duer, 471.

[5] Hersfield *v.* Adams, 19 Barb. 577. Where it is held that express agents who transport parcels, by other lines of common carriers, are not themselves common carriers, but only forwarders, and liable as such.

[6] Pickford *v.* Grand Junction Railway, 10 M. & W. 399.

[7] Sandford *v.* The C. W. & E. Railw. Co. 24 Penn. R. 378.

carriers of passengers are liable as common carriers for their ordinary baggage, or, as it is more commonly called in the English books, luggage.[1] And it is considered that, as railways have made their checks evidence in regard to the delivery of baggage, the possession of such check by a passenger is evidence against the company, of the receipt of the baggage. In one case, the court say, "It stands in the place of a bill of lading."[2]

2. And where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route, and check baggage through, an action lies against either company for the loss of baggage.[3] And it is the duty of railway companies to keep agents in readiness to receive baggage, and if they allow the agents of other companies to receive baggage at their stations, or their own agents to receive it at the stations of other companies, they are bound by their acts.[4]

3. And where the company employ porters, at their stations, to convey passengers' baggage to the carriages in which the passengers leave the stations of the company, their liability continues till it is so delivered, and it makes no difference whether the baggage be placed in the same carriage with the passenger, or in the baggage car.[5] But if the passenger choose to take the

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[1] Brooke *v.* Pickwick, 4 Bing. 218; Hawkins *v.* Hoffman, 6 Hill (N. Y.) R. 586; Bennett *v.* Dutton, 10 N. H. R. 481; Powell *v.* Myers, 26 Wend. R. 591; 7 Rich. 158, 162; 13 Wend. 611; Robinson *v.* Dunmore, 2 Bos. & P. 416; Clarke *v.* Gray, 6 East, 564; 4 Esp. R. 177.

[2] Dill *v.* Railway Co. 7 Rich. 158. And where the carrier gave public notice that he would not be liable for baggage of passengers, unless checked; this will not, if it have any effect, excuse him, where the passenger delivered his baggage on board the carrier's steamboat, to a proper agent, but was refused a check, because the person who gave the checks was not present. Freeman *v.* Newton, 3 E. D. Smith, 246.

[3] Hart *v.* Rensselaer and Sar. Railway, 4 Seld. 37. The person selling the tickets and receiving the baggage, is here treated as the agent of each company. This suit is against the last company on the route. And there was no evidence in the case where the loss occurred. Stratton *v.* N. Y. & N. H. Railway, 2 E. D. Smith, 184.

[4] Jordan *v.* The Fall River Railway, 5 Cush. 69.

[5] Richards *v.* The London, Brighton & South Coast Railway, 7 C. B. 839. In a late case, Butcher *v.* London & S. W. Railway, 29 Eng. L. & Eq. R. 347, the plaintiff was a passenger from F. to W., bringing with him, as luggage, a small carpet bag, which was placed in the carriage he rode in. On arrival of the train at W., the plaintiff got out upon the platform with his bag in his hand, and it was taken from him by a railway porter to be placed in one of the cabs which were

exclusive control of his own baggage, as a purse, or coat, cane, or umbrella, for instance, the company are not ordinarily liable.[6] But the liability having once attached by a delivery to the company's servant, they remain liable until a full and unequivocal redelivery to the owner, and ordinarily to the end of the route.[7] A delivery upon a forged order is no excuse.[8]

4. But where a passenger took passage upon one railway, for B., at which point he intended to take passage upon another railway, whose terminus was about one hundred yards distant from the terminus of the first railway, there being an open, uncovered * space between the two stations, and no connection in business between the companies, but a practice appears to have been conceded for the first company to carry luggage to the station of the other company. The porter obtained the plaintiff's portmanteau, from the platform where it had been deposited at the end of the first line, and placed it with other luggage on a truck for the purpose of taking it across to the station of the other railway. The plaintiff testified, at the trial before the county court, that he saw the porter, immediately after, with the truck, enter the station of the latter railway, and go to the place where luggage was put upon departing trains, but did not see his portmanteau, to recognize it, after it was first put upon the truck. He obtained his

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standing in the station. The plaintiff never saw his bag again, and the porter could not find it. It was proved to be the practice of the company to have their porters assist in carrying the passengers' luggage to the cabs in the station. Held, that there was evidence of the company having contracted to deliver the plaintiff's bag to the cab, and of their not having performed the contract, and that, whether the plaintiff had accepted a delivery upon the platform in lieu of a delivery to the cab, was a question of fact for the jury.

[6] Tower *v.* Utica & Sch. Railway, 7 Hill (N. Y.) R. 47; *Wilde*, J., in Richards *v.* London B. & South Coast Railway, 7 C. B. 839. But, if the company have charge of the things in any manner, they are liable, notwithstanding the owner may also have an eye upon them. Robinson *v.* Dunmore, 2 Bos. & Pul. 416, *Chambers*, J.; Cohen *v.* Frost, 2 Duer, 335. Carriers of passengers, as steamboat proprietors, are not liable for the loss of wearing apparel which passengers carry about their persons, and do not deliver to the officers of the boat, as baggage, for safe-keeping. Steamboat Cr. Palace *v.* Vanderpool, 16 B. Monr. 302, 308.

[7] Camden & Amboy Railway Co. *v.* Belknap, 21 Wend. 354.

[8] Powell *v.* Myers, 26 Wend. 591. If baggage be not called for in a reasonable time, the liability of the company as carriers ceases, and they are holden only for ordinary care, as bailees for hire. *Post*, § 130.

ticket, and asked the guard if his portmanteau was in the luggage van, and the guard told him to take his seat in the train, as it was about to move off, and to inquire for his portmanteau at the end of his route, which he did, but failed to find it. This suit was brought against the first company for not delivering the portmanteau either to the plaintiff, or to the second railway, and the county court gave judgment against them upon the foregoing evidence. But it was held, on appeal to the C. B., that the plaintiff must give preponderating evidence of the non-delivery; and the mere fact of its non-arrival at its ultimate destination, on the second railway, is not sufficient, nor was the above evidence more consistent with the non-delivery than the delivery, and the judgment of the county court was reversed.[9]

But, where an emigrant passenger, on a voyage from Liverpool to New York, took the exclusive possession of his trunk, taking it into the steerage, placing it under his bed, and fastening it to his berth by ropes, and during the voyage it was stolen, it was held that the owners of the ship were not liable.[10]

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[9] In this case, the evidence all tended certainly to show a delivery to the second company, and therefore there was no testimony tending to prove the fact upon which the case is made to turn in the C. C. The decision in this case, therefore, seems consistent with those cases where the Court of Error has refused to reverse the judgment of the inferior court, depending in any degree upon the determination of a disputed fact by the court rendering the judgment, where any testimony tends to support the judgment below. East Ang. Railway *v.* Lythgoe, 10 C. B. 726; 2 Eng. L. & Eq. R. 331; Cawley *v.* Furnell, 12 C. B. 291; 6 Eng. L. & Eq. R. 397; Cuthbertson *v.* Parsons, 12 C. B. 304; 10 Eng. L. & Eq. R. 521.

[10] Cohen *v.* Frost, 2 Duer, (N. Y.) 335. In Fisher *v.* Clisby, 12 Ill. 344, it was held, that passengers on board of a ferry-boat, in taking care of their own property, after it has once got into the boat, may be regarded as agents of the ferryman, who is still liable for the property as a common carrier. The common carrier of passengers, by receiving the baggage of a traveller, becomes immediately responsible for its safe delivery at the place of destination. Woods *v.* Devin, 13 Ill. R. 746. But see White *v.* Winnisimmet Co. 7 Cush. 155, where a person suffered damage, in crossing a ferry, by not taking proper care of his team, and the company were held not liable as common carriers, unless the owner of the team surrendered its custody to the ferryman, or his servants. In the case of Wilson *v.* Hamilton, 4 Ohio St. R. 722, it was held, that a ferryman is a common carrier; but if the owner of animals, intrusted to his care, knows of any special cause of peril, he is bound to inform, and if the owner, or his agent, take upon himself the care of the property, he is not to be regarded as the agent of the carrier in so doing, and the carrier is not liable for any injury resulting from

*5. A servant travelling with his master on a railway, may have an action in his own name against the company for the loss of his baggage, although the master took and paid for his ticket. The liability, in such case, is independent of contract, and the payment by the master will satisfy an averment of payment by the plaintiff.[11]

*SECTION VI.

WHEN THE CARRIER'S RESPONSIBILITY BEGINS.

1. *Begins, in general terms, upon delivery of the goods.*
2. *Delivery at the usual place of receiving goods, with notice, sufficient.*
3. *Where goods are delivered to be carried, carrier liable from delivery.*
4. *But not responsible till they receive the goods, on a continuous line.*
5. *Acceptance by agent sufficient, without payment of freight.*
6. *Question of fact, whether carrier took charge of the goods.*
7. *Sufficient to charge company, that goods are put in charge of their servants.*
8. *Whether goods are left for immediate transportation, matter of inference often.*

§ 129. 1. There is no difficulty in defining in general terms, when the liability of the carrier begins. It begins, when the

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the want of care in the owner or his agent. Nor is the owner precluded from recovering because he did not do all that skill or prudence could have suggested. See Richards *v.* Fuqua, 28 Miss. R. 792.

The passenger not accompanying his baggage, but going in an after train, will not excuse the carriers from their ordinary liability. Logan *v.* Pontchartrain Railway, 11 Rob. (Louis.) R. 24.

But in Wright *v.* Caldwell, 3 Mich. R. 51, where the plaintiff, intending to take passage on defendant's steamboat, deposited his trunk on board the boat, in the usual place for baggage, but without notifying any one employed on the boat, or making known his intention to take passage, and while temporarily absent, the boat left, and the trunk could not afterwards be found, it was held no such delivery, as to charge the defendant, as a common carrier.

And an offer to deliver freight, or passengers' baggage, made at a proper time, though declined, discharges the carrier from his liability, as such; and if the freight, or baggage, still remains in his custody, he is only liable, as a bailee, for ordinary care. Young *v.* Smith, 3 Dana, 91. This was the case of a large amount of specie, carried, by consent of the officers of a steamboat, by a passenger, to be deposited in bank, in the city of New Orleans. The court held it not requisite to deliver the specie in banking hours, unless some special contract, or established usage of the port, to that effect, were shown, but that an offer to deliver any time in business hours, reasonable reference being had to its safety, was sufficient.

[11] Marshall *v.* York, Newcastle & Berwick Railway, 7 Eng. L. & Eq. R. 519. In a declaration in case, against a common carrier, it is not necessary to allege

goods are delivered to him, or his proper servant, authorized to receive them, for carriage.

2. But many questions have arisen as to what amounted to a delivery, so as to put the goods into the constructive custody and risk of the carrier. If the goods are delivered at the usual place of receiving similar articles, and notice given to the proper servant of the company, there is little chance for any question upon this subject, in regard to the responsibility of the company to the end of their route. For a carrier is bound to keep the goods safely after delivery to him, for carriage, as well as to carry safely.[1] Questions have often arisen upon this subject, where the person to whom the delivery was made, acted as a forwarding merchant, or warehouse keeper, or in some capacity, independent of that of carrier, whether the delivery and acceptance of the goods, was in the capacity of carrier, or agent for the carrier, or in the other capacity, which the person sustained.

3. But in the case of railways such questions seldom arise, at *the beginning of the transit, unless where the goods are delivered, to be kept in warehouse, until further orders, in which case the liability of carriers will not attach until the goods are ordered to be carried. But when this order is given, and also when the goods are left, in the first instance, to be carried presently, the responsibility of the carrier attaches, at once.[2]

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the payment of, or agreement to pay, compensation. Hall *v.* Cheney, June T. N. H. Sup. Ct. 1857, 20 Law R.

[1] *Lee*, Ch. J., in Dale *v.* Hall, 1 Wilson, 282; Merriam *v.* Hartford and New Haven Railway, 20 Conn. R. 354. In this last case, it was decided, that a delivery, upon a wharf, where steamboat carriers were accustomed to receive their freight, and which they held, as private property, fenced off from the street, for that purpose, and where they usually had some one to take charge of freight, was a constructive delivery to the carriers although no notice to the freight-master was proved, it being shown to be the custom of the company to regard all freight delivered on that dock as received for transportation.

The goods, in this case, were given in charge of one of the steamboat hands, who seemed to have charge of the dock, and who said, on being informed of the delivery, "all right."

[2] Spade *v.* Hudson River Railway, 16 Barb. 383. In this case the plaintiff took part of the goods away, after they were put into the custody of defendants' servants, without their knowledge, and it was held the company were simply depositaries, and were not liable as carriers; and plaintiff could not call upon a jury to conjecture how many of the goods were lost, but must show first how many he took away, and how many he left.

4. In a case where a railway formed part of a continuous line of transportation, and had an agent at Charleston (S. C.) to look after goods arriving at that point, for the interior, along the line of their railway, and a package of goods, so addressed, as to have gone over such railway, was lost after its arrival at C., it was held, "that until the goods are in possession of the railway they are not liable as common carriers." [3]

5. It has been held sufficient to charge the carrier, that the delivery was at a place, and to a person, where, and with whom, parcels were accustomed to be left for this carrier; and it is immaterial whether any payment of freight is made to this person.[4]

6. But an acceptance, by the carrier, at an unusual place, will be sufficient to charge him. It seems always sufficient that the goods are "put into the charge of the carrier." [5] And what is a sufficient putting in charge of the carrier, must always be a question of fact, to be judged of by the jury, with reference to all the circumstances of the case, and the usual course of business, in similar transactions, at the same place, and with the same company. And it will be found ordinarily, to resolve itself into this inquiry, whether the owner of the goods did all, to effect a secure delivery * to the carrier, which it was reasonable to expect a prudent man to have done, under the circumstances.

7. But the cases all agree that it is always sufficient, if the proper servants of the company accept the goods to carry, whether the acceptance is in writing, or not, or whether any bill, or any entry, in the books of the company, is made.[6] And the point of such acceptance and charge by the carrier, is ordinarily, when the goods are put into the charge of those who are in law the ser-

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[3] Maybin *v.* The S. C. Railway, 8 Rich. 246. In the case of Ranney *v.* The Huntress, 4 Law J. 38, U. S. C. C. Maine District, in Admiralty, for a box of goods, shipped at Boston, to be delivered at Portland, it was held, "It is the duty of the owners of goods to have them properly marked, and to present them to the carrier, or his servants, to have them entered on their books, and if they neglect to do it, and there is a misdelivery and loss, in consequence, without any fault of the carrier, the owners must bear the loss."

[4] Burrell *v.* North, 2 C. & Kirwan, 680. *Erle*, J., said, "If the defendant allow these persons to receive parcels, to be conveyed by him, as a carrier, this is quite enough."

[5] Lord *Ellenborough*, Ch. J., in Boehm *v.* Combe, 2 M. & S. 172.

[6] Citizens' Bank *v.* Nantucket Steamboat Co. 2 Story, 16; Philipps *v.* Earle, 8 Pick. R. 182; Pickford *v.* Grand Junction Railway, 12 M. & W. 766.

vants of the carrier.[7] It has been considered that if the owner assume the care and custody of the thing himself, instead of trusting it to the carrier, the carrier is not liable for the loss.[8] But the fact that the owner accompanies the goods to keep an eye upon them, if he do not exclude the care of the carrier's servants, will not excuse the carrier.[9]

But it has been held, that the delivery of the goods must be made known to the servants of the company or carriers. This would seem indispensable ordinarily, to constitute carefulness, and good faith, on the part of the owner.[10]

8. Where a railway have a warehouse, at which they receive goods for transportation, as common carriers, and goods are delivered there, with instructions to forward presently, the company are liable, as common carriers, from the delivery of the goods. But if they are kept back by direction of the owner, the company are only liable as depositaries.[11] Instructions to forward forthwith may be *inferred, from the course of business, in the absence of express proof.[11] And where the owner gave instructions to forward immediately, he will not be bound, by counter instructions given by the cartman without his authority.[11]

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7 Boys *v.* Pink, 8 C. & P. 361; Davey *v.* Mason, C. & Marsh. 45. But the crew of a steamboat are not the agents of the boat, for the purpose of receiving freight, whereby to charge the owner as a common carrier. Trowbridge *v.* Chapin, 23 Conn. 595.

8 Tower *v.* The Utica & S. Railway, 7 Hill (N. Y.) R. 47. This is the case of a passenger who left his overcoat upon the seat in the car and forgot to take it. Miles *v.* Cattle, 6 Bing. 743, is to the same effect. § 138, *post.* But a passenger carrier is not liable for what is not ordinary baggage. Orange Co. Bank *v.* Brown, 9 Wendell, 85; East Ind. Co. *v.* Pullen, 2 Strange, 690.

9 Robinson *v.* Dunmore, 2 Bos. & P. 416.

10 Selway *v.* Holloway, 1 Ld. Ray. 46; Packard *v.* Gitman, 6 Cow. R. 757.

11 Moses *v.* Boston and Maine Railway, 4 Foster, R. 71. And if the defendants are both warehousemen and carriers, and receive goods, with instructions to forward immediately, they are liable, as carriers. Clarke *v.* Needles, 25 Penn. R. 338; Blossom *v.* Griffin, 3 Kernan, 569.

But where goods are received as wharfingers, or warehousemen, or forwarding merchants, and not as carriers, the bailors are only liable for ordinary neglect. Platt *v.* Hibbard, 7 Cowen, 497.

SECTION VII.

TERMINATION OF CARRIER'S RESPONSIBILITY.

1. *Responsibility of carrier of parcels for delivery.*
2. *Company not bound to make delivery of ordinary freight.*
3. *The duty, as to delivery, affected by facts, and course of business.*
4. *Railway company not bound to deliver goods, or give notice of arrival.*
5. *Rule, in regard to delivery, in carriage by water.*
6. *Only bound to keep goods reasonable time after arrival.*
7. *Consignee must have reasonable opportunity to remove goods.*
8. *After this, carrier only liable for ordinary neglect.*
9. *If goods arrive out of time, consignee may remove, after knowledge of arrival.*
10. *So if company's agent misinform the consignee.*
11. *Carrier excused, when consignee assumes control of goods.*
12. *Effect of warehousing, at intermediate points, in route.*
13. *If carrier has place of receiving goods, responsibility attaches on delivery there.*
14. *Warehouse-men, who are carriers, held responsible as carriers, on receipt of goods, generally.*

§ 130. 1. Where, by the course of a carrier's business, he is accustomed to deliver goods and parcels, by means of porters, or servants, at the dwellings, or places of business, of the consignees, as was formerly the case, to a great extent, in England, and, as is now done, by express companies in this country, the carrier's responsibility continues, until an actual delivery to the consignee, or at his dwelling, or place of business.[1] So, too, if the carrier deliver a parcel to a wrong person, without fault on the part of the owner, he is liable, as for a conversion.[2]

2. But this mode of delivery has no application to the ordinary business of railways as common carriers of goods. The *transportation being confined to a given line, according to the ordinary and reasonable course of business, goods must be delivered, and received, at the stations of the company. And unless they adopt a different course of business, so as to create a different

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[1] Hyde *v.* Trent & Mersey Navigation Co. 5 T. R. 389. In this case the carrier charged for cartage to the house of the consignee. In Stephenson *v.* Hart, 4 Bing. 476, it was considered a proper inquiry for the jury, "whether the defendants had delivered the box according to the due course of their business, as carriers." Golden *v.* Manning, 2 Wm. Bl. 916; 3 Wil. 429, 433.

[2] Duff *v.* Budd, 3 Brod. & B. 177. So, too, if the carriers deliver the goods, at a different place from that named in the bill of lading, although one named in former consignments of the same parties. Sanquer *v.* London, &c. R. 32 Eng. L. & Eq. 338.

expectation, or stipulated for something more, there is no obligation to receive, or to deliver freight, in any other mode. But where such companies contract to receive, or to deliver goods, at other places, or where such is the course of their business, they are undoubtedly bound by such undertakings, or by such usage, and course of business.[3]

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[3] Farmers & Mechanics Bank *v.* Champlain Transportation Co. 23 Vt R. 186, 209; Noyes *v.* Rut. & Bur. Railway, 27 Vt. R. 110; 1 Parsons on Cont. 661. We here adopt Professor Parsons's note of the case, (23 Vt. R. 186, *supra.*) "This is one of the strongest cases in the books upon this point. The defendants were common carriers on Lake Champlain, from Burlington to St. Albans, touching at Port Kent and Plattsburg long enough to discharge and receive freight and passengers. This action was brought against them to recover for the loss of a package of bank-bills. It appeared in evidence that the package in question, which was directed to 'Richard Yates, Esq., Cashier, Plattsburg, N. Y.,' was delivered by the teller of the plaintiffs' bank to the captain of defendants' boat, which ran daily from Burlington to Plattsburg, the captain delivered the package to one Ladd, a wharfinger, and that it was lost or stolen while in Ladd's possession. No notice was given by the captain of the boat to the consignee of the arrival of the package, nor had he any knowledge of it until after it was lost. The principal question in the case was, whether the package was sufficiently delivered, to discharge the defendants from their liability as carriers. The defendants offered evidence to show that a delivery to the wharfinger, without notice, under the circumstances of the case, was a good delivery according to their own uniform usage, and the usage of other carriers similarly situated. The case has been before the Supreme Court of Vermont three times, and that court has uniformly *held* that, in the absence of any special contract, a delivery to the wharfinger without notice, if warranted by the usage of the place, was sufficient, and discharged the defendants from all liability. When the case was before the court the last time, the court said :—

"The only difficulty which the court, from the first, have ever felt in this case, has been in regard to the extent of the defendants' undertaking to convey the parcel; in other words, as to the extent and termination of the transit or carriage by the defendants. The county court in the trial of this case, seem to have assumed that in the law of carriers there was a general well-defined rule upon this subject, and that the defendants were attempting to escape from its operation by means of some local usage or custom, in contravention of the general rules of law upon the subject. In this view of the case, the defendants were justly held to great strictness in the proof of the usage. It becomes, therefore, of chief importance to determine how far there is any such general rule of law as that which is assumed in the decision of the case in the court below. If the law fixes the extent of the contract, in every instance, in the manner assumed, then, most undoubtedly, are the defendants liable in this case, unless they can show, in the manner required, some controlling usage. But if, upon examination, it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is matter resting altogether in proof, then the course of business at the

*3. The cases to some extent regard the question, when the duty of the carrier ends, as one of fact, or contract, to be determined by the jury, with reference to the mode of transportation, the special undertaking, if any, the course of business, at the place, and other attending circumstances. It finally resolves itself often into the inquiry, whether the carrier did all, in respect to the goods, which, under the peculiar duties of his office, the owner had a right to expect of him.[3]

4. But where the facts are not disputed, and the course of business of the carrier is uniform, the extent of the carrier's liability will become a question of law merely, as all such matters are, under such circumstances.[3] And we understand the cases to

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place of destination, the usage or practice of the defendants, and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself. All the cases almost without exception, regard the question of the time and place when the duty of the carrier ends, as one of contract, to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carrier, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties. The inquiry, then, in the present case, must come to this before the jury, whether it was reasonable for the plaintiffs, under the circumstances, to expect the defendants to do more than to deliver the parcel to the wharfinger? If not, then that was the contract, and that ended their responsibility, and the plaintiffs cannot complain of the defendants because the wharfinger was unfaithful. The defendants, unless they have either expressly or by fair implication undertaken on their part to do something more than deliver the parcel to the wharfinger, are no more liable for its loss than they would have been had it been lost upon ever so extensive a route of successive carriers, had it been intended to reach some remote destination in that mode. But if the plaintiffs can satisfy the jury that from the circumstances attending the delivery, or the course of the business, they were fairly justified in expecting the defendants to make a personal delivery at the bank, they must recover; otherwise, it seems to us, the case is with the defendants. . . . .

"It might be consoling to the carriers and to others, if we could lay down a rule of law somewhat more definite in this case. But from the almost infinite diversity of circumstances, as to steamboat carriage, that is impossible. There will usually be at every place some fixed course of doing the business, which will be reasonable; or it would not be submitted to, and which will be easily ascertained on inquiry, and with reference to which contracts will be made, and which it is equally the interest and the duty of both parties to ascertain, before they make contracts, and which it would be esteemed culpable negligence in any one not to ascertain, so far as was important to the correct understanding of contracts which he was making."

have settled * the question, that the carrier, by railway, is neither bound to deliver to the consignee personally, or to give notice[3] of the arrival of the goods.

5. The rule of law, and the course of business, in regard to carriage by water, have always been considered different from land carriage. In regard to foreign carriage, it is perfectly well settled that a delivery at the wharf, with notice and some of the cases say, even without notice, unless there be some special undertaking in the bill of lading, is sufficient. The consignee is presumed to have received from his correspondent a copy of the bill of lading, and is bound to take notice of the arrival of the ship.[4] A distinction has been attempted in some of the cases, between the foreign and internal and coasting carrying business, in regard to the delivery or landing upon the wharf, being sufficient to exonerate the carrier.[5]

6. But the cases all agree that in regard to carriers, by ships and steamboats, nothing more is ever required, in the absence of special contract, than landing the goods at the usual wharf, and giving notice to the consignee, and keeping the goods safe, a sufficient time after, to enable the party to take them away. After that the carrier may put them in warehouse, and will only be liable, as a depositary, for ordinary neglect.[6] And the prevailing opinion seems to be, at the present time, that the necessity of giving notice of the arrival of the goods depends upon custom, and usage, and the course of business at the place.[7]

The course of doing business upon railways, in being confined to a particular route, having stated places of deposit, and generally erecting warehouses for the safe-keeping of goods, all seem to require that the same rule, as to the delivery of goods, should prevail which does in transportation by ships and steamboats.[8]

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4 Cope *v.* Cordova, 1 Rawle, 203, opinion of *Rogers*, J.; Ang. on Carriers, § 312, 313, *et seq.;* 2 Kent, Comm. 604, 605.

5 Ostrander *v.* Brown, 15 Johns. R. 39, where it is held that such a deposit is not sufficient, but the carrier must continue his custody, till the consignee has had sufficient time, after the landing of the goods and notice, to come and take them away. Hemphill *v.* Chenie, 6 Watts & S. 66.

6 Garside *v.* Trent & Mersey Nav. Co. 4 T. R. 581; *In re* Webb, 8 Taunt. R. 443; S. C. 2 J. B. Moore, R. 500; 2 Kent, 605.

7 Price *v.* Powell, 3 Comst. R. 322.

8 Norway Plains Co. *v.* Boston & Maine Railway, 1 Gray, 263. Opinion of

Accordingly it was held that the proprietors of a railway, who are common carriers of goods, and when they arrive at their destination, deposit them in their warehouse, without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers, for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars, and placed in the warehouse, but are liable only for ordinary neglect as warehousemen. And it will make no difference, it is here said, in regard to the liability of the carriers, that the goods were destroyed by fire, in the warehouse, before the owner or consignee had opportunity to take them away.[9]

This last proposition is perhaps not in strict accordance with most of the cases upon the subject under analogous circumstances. In a late case in New Hampshire,[10] the rule of the liability of the carrier and the warehouse-man are both stated differently somewhat from that laid down in the last case. In regard to the liability of the carrier, as such, it is said it will continue till discharged, "by a delivery of the goods to the bailor, or a tender or offer to deliver them, or such act, as the law regards as equivalent to a delivery, as for instance, in some cases, by depositing them in the warehouse of a responsible person." No intimation is here given that a deposit merely in the carrier's own warehouse, is sufficient to release the carriers.

7. And upon principle, it seems more reasonable to conclude, that it does not, until the owner or consignee, by watchfulness, has had, or might have had an opportunity to remove them. This is certainly so to be regarded, if the building of warehouses, by railways, is to be considered part of their business as carriers, and for their own convenience. It seems to be settled that the

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Shaw, Ch. J., 272. Opinion of court in Farmers' & Mech. Bank *v.* Champlain Transp. Co. 23 Vt. R. 211.

9 Norway Plains Company *v.* Boston & Maine Railway, 1 Gray, R. 263. It is said, in this case, that the company is not obliged to give notice to the consignee of the arrival of the goods. Indeed, that point is virtually decided here. For if there is any obligation to give notice, there is also to keep the goods a sufficient time after, to enable the party to remove them. And in this case there was no opportunity to remove them, after the arrival. If there is any ground to question this decision, it is because there was no opportunity to remove the goods after their arrival.

10 Smith *v.* Nashua & Lowell Railway, 7 Foster, R. 86.

depositing of freight in their warehouses, at the time of receiving it, is to be so regarded, unless there are special directions given, and that *the responsibility of the carrier attaches presently upon the delivery.[11]

8. There is then no very good reason, as it seems to us, why the responsibility of the carrier should not continue, until the owner or consignee, by the use of diligence, might have removed the goods. The warehousing seems to be with that intent, and for that purpose. And if we assume, as we must, we think, that there is no obligation upon railway carriers, to give notice of the arrival of the goods, there does still seem to be reason and justice in giving the consignee time and opportunity to remove the goods, by the exercise of the proper watchfulness, before the responsibility of the carrier ends. In the case of Smith *v.* Nashua & Lowell Railway, it is held that there is no duty upon railway carriers to store goods, after the consignee has notice of their arrival, and reasonable time to remove them. Of course, then, there is no absolute duty to keep warehouses, provided the company choose to give notice of the arrival of goods, in every case, and suffer them to remain in their cars until the consignee has reasonable opportunity to remove them. It is only for their own convenience in keeping goods, to be carried, till the train is ready to depart, or after their arrival until the consignee has reasonable opportunity to remove them. After that there is no doubt the carrier's responsibility as such, ceases, and if the goods remain in the warehouse of the company, it is only with the responsibility of ordinary bailees for hire, as held in Norway Plains Co. *v.* Boston & Maine Railway, or as was held in Smith *v.* Nashua & Lowell Railway, with the responsibility of a bailee without compensation. The former degree of responsibility seems to us the just and reasonable one, as it is an accessory of the carrying business, and the carrier, after he becomes a warehouse-man, is no doubt fairly entitled to charge, in that capacity. The omission to charge for warehousing in the first instance, being the result of the course of the business, and because it is a part of the carrier's duty to keep the goods safely, till the consignee has opportunity, by the use of diligence, to remove them.

And this seems to us the extent of the decision in Thomas *v.*

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[11] *Ante*, § 129, and cases cited.

Boston & Providence Railway.[12] This point is there very distinctly *stated, by *Hubbard*, J.: "And where such suitable warehouses are provided, and the goods, *which are not called for on their arrival at the places of destination*, are unladed, and stored safely in such warehouses, the duty of the proprietors, as common carriers, is, in our judgment, terminated."

9. But when the same rule is applied to goods, arriving out of time, and before the consignee could have removed them, reason and justice seem to us to require, that if the company put them into their warehouse, for their own convenience, their responsibility as carriers, should not be thereby terminated, until the consignee has reasonable opportunity to remove them.[13] We

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[12] 10 Met. R. 472. In this case the action was for one roll of leather, out of four, lost while in the defendants' warehouse. The four rolls arrived upon the train, and were deposited in the warehouse. The freight was paid on the whole, and the whole pointed out to the teamster, who called for them, at the depot, and he carried away but two of them. After this the loss occurred, and there could be no manner of doubt whatever, that the goods were remaining in the warehouse, for the convenience of the owner, and after a reasonable time for the removal had elapsed.

There could be no question whatever, that the decision is fully justified, and that it comes fairly within the principle of the case of Garside *v.* Trent & Mersey Nav. Co. 4 T. R. 581, upon the authority of which it professes to go.

[13] Michigan Central Railway *v.* Ward, 2 Mich. 538. In this case, notice of the arrival of the goods is held necessary to terminate the responsibility of the carrier. But the statute in this state provides, that the responsibility of the carrier shall cease, as such, after notice of the arrival of the goods a sufficient time to enable the consignee to remove them, and the court considered, that, by consequence, it will continue till that period. And in Rome Railway *v.* Sullivan, 14 Ga. R. 277, the same rule in regard to notice is adopted, upon general principles.

The former case was an action to recover the value of wheat carried, by the plaintiffs in error, from Kalamazoo to Detroit, and there destroyed by fire directly after it was received in their warehouse. The court acknowledge the general duty of carriers to make personal delivery to the consignee, and say: "But to this general rule there are many exceptions. With great force and reason the law implies an exception to that large class of common carriers whose mode of transportation is such as to render it impracticable to comply with this rule; it embraces all carriers by ships, and boats, and cars upon railways. These must necessarily stop at the wharves and depots on their respective routes, and consequently personal delivery would be attended with great inconvenience, and therefore the law has dispensed with it. But in lieu of personal delivery, which is dispensed with in this class of carriers, the law requires a notice, and nothing will dispense with that notice.

should therefore *have felt compelled to rule the case of Norway Plains Co. *v.* Boston & Maine Railway, in favor of the plaintiffs.

And in a late case in New Hampshire, which has come to hand since writing the foregoing, we understand the court take precisely the same view stated in the text.

The case is Moses *v.* Boston & Maine Railway, 32 N. H. R. 523, and was, where a quantity of wool arrived at the company's station, the place of its final destination, about three o'clock in the afternoon. In the usual course of business from two to three hours were required to unload the freight from the cars into the warehouse, and the gates were closed at five o'clock, so that no goods could be removed from the warehouse after this hour, until the next morning. During the night, the warehouse and the wool therein were destroyed by fire.

It was held, that the responsibility of railway companies, as common carriers, for goods transported by them, continues until the goods are ready to be delivered at the place of destination, and the owner, or consignee, has had a reasonable opportunity, during the hours when such goods are usually delivered there, of examining them, so far as to judge from their outward appearance, whether they are in proper condition, and to take them away.

But it was held, that the consignee must take notice of the course of business, at the station, and the time of the arrival of the train, when his goods may be expected, and be ready to receive them, in a reasonable time after their arrival, and when in such common course of business, they may fairly be expected to be ready for delivery.

That upon the facts in this case, the jury were warranted in finding, that the consignee had not a reasonable opportunity to take the wool into his possession before the fire, and that defendants were liable therefor as common carriers, notwithstanding it might be proved by them, that, before the fire, the wool had been placed upon the platform in the warehouse, from which such goods were usually delivered, separate from other goods, and ready to be delivered.

In this case, and in a case between the same parties, 4 Foster, 71, it is held, that the common-law liability of the carrier, as to goods in his warehouse, before and after the transportation, cannot be restricted by a mere notice brought home to the knowledge of the owner.

While goods are in warehouse, after their arrival at their place of destination, and are carried away, by some one, by mistake, and without the fault of the company's agents, they are not liable. But if the company's agents deliver them, either positively or permissively, to the wrong person, by mistake, the company are liable. And they are *primâ facie* liable for non-delivery, and the burden of proof is upon them to show that the goods were lost without their fault, although they may not be able to show precisely the manner of the loss. Lichtenhein *v.* Boston & Providence Railway, 11 Cush. R. 70.

In the case of Chicago & Rock Island Railway *v.* Warren, 16 Ill. R. 502, it was held, that common carriers could not relieve themselves of their liability, as such, by depositing the goods in warehouse, until this was evinced by some open and distinct act. As if the storage were to be in the car that must be separated from the train, and placed in the usual place for storage, in the care of a proper

But in justice to the very elaborate opinion of *Shaw*, Ch. J. who has perhaps no superior upon this continent, as a wise and just expositor of the law, as a living and advancing study, we shall give the substance of it in his own words.[14] We may be allowed

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person, and that the proof of this change rested upon the carrier. *Scates*, Ch. J., says: "Goods may not be thrown down in a station-house, or on a platform, at their destination, in the name and nature of delivery. The responsibility of the carrier must last till that of some other begins, and he must show it."

[14] "This action was to recover the value of two parcels of merchandise forwarded by plaintiffs to Boston in cars of defendants. The goods are described in two receipts of defendants, dated at Rochester, N. H., one October 31, 1850, the other November 2, 1850. The goods specified in the first receipt were delivered at Rochester, and received into the cars and arrived seasonably in Boston on Saturday, the 2d of November, and were then taken from the cars and placed in the warehouse of defendants; that no special notice was given to plaintiffs, or their agents, but that the fact was known to Ames, a truckman, who was their authorized agent employed to receive and remove the goods; that they were ready for delivery at least as early as Monday morning, the 4th of November, and that he might then have received them. The goods specified in the other receipt were forwarded to Boston on Monday, the 4th of November;—the cars arrived late. Ames, the truckman, knew, from inspection of the way-bill, that the goods were on the train, and waited some time, but could not conveniently receive them that afternoon in season to deliver them at the places to which they were directed, and for that reason did not take them. In the course of the afternoon they were taken from the cars and placed on the platform within the depot. At the usual time, at that season of the year, the doors were closed. In the night the depot was burned down, and the goods destroyed by an accidental fire. The fire was not caused by lightning, nor was it attributable to any default, negligence, or want of due care on the part of defendants, or their agents. . . . . The question is, whether, under these circumstances, defendants are liable for the loss of the goods.

"If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity, as warehouse-men, then they were responsible only for the care and diligence which the law attaches to that relation, and this does not extend to a loss by accidental fire, not caused by the default or negligence of themselves or their servants. The question then is, when and by what act the transit of the goods terminated. It was contended in this case, that in the absence of special contract or evidence of a local usage, &c., to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery. This rule applies very properly to the case of goods carried by wagons, and other vehicles traversing the common highways and streets, and which, therefore, can deliver the goods at the houses of the respective consignees. But it cannot apply to railroads whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea in this respect, that from the very

to say, * that it seems to us, the opinion and argument of the learned chief justice might, for the most part, be quite as well

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nature of the case, the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of *Buller*, J., in Hyde *v.* Trent & Mersey Navigation Co. 5 Term R. 397: 'A ship trading from one port to another has not the means of carrying the goods on land, and according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carriers.' The court are of opinion, that the duty assumed by the railroad is—and this being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them, so as to constitute an implied contract between them—that they will carry the goods safely to the place of destination and there discharge them on the platform, and then and there deliver them to the consignee or the party entitled to receive them if he is then and there ready to take them forthwith, or if the consignee is not then ready to take them, then to place them securely and keep them safely a reasonable time ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers and of the contract between the parties when not altered or modified by a special agreement.' 'This we consider to be one entire contract for hire, and although there is no separate charge for storage, yet the freight fixed by the company to be paid as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both services, as well the absolute undertaking for carriage, as the contingent undertaking for storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of carriers by railroad, we think there result two distinct liabilities, first that of common carriers, and afterwards that of keepers for hire, or warehouse keepers, the obligation of each of which is regulated by law. We may say then, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts, or in analogy to the old rule that delivery is necessary, it may be said that delivery by themselves as common carriers to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence.'

"Indeed the same doctrine is distinctly held in Thomas *v.* Boston & Providence Railway, 10 Met. 472, with the same limitation. The point that the same company under one and the same contract may be subject to distinct duties for a failure in which they may be liable to different degrees of responsibility, will result from a comparison of the two cases of Garside *v.* Trent & Mersey Navigation Co. 4 Term R. 581, and Hyde *v.* Same, 5 id. 389. See also Van Santvoord *v.* St. John, 6 Hill, 157; McHenry *v.* Phila. Wil. &c. Railroad, 4 Harring. 448." In the case of *In re* Webb, 8 Taunt. 443, which was where common carriers

applied to the *rule for which we contend, as to have reached the result which it did.

*10. And where the consignee called for the goods, and the station agent told him they were not there, and in consequence they were not removed, but were destroyed by fire the same night, it was held the company were liable.[15]

11. And where the agent of the consignee requested the agent of the company to suffer the car in which was a block of marble, transported by them, to be removed to the depot of another railway, and he assented, and assisted in the removal of the car, and after the removal, the agent of the consignee procures the use of the machinery of the second company to unload the block, which is broken through defect of such machinery, it was held the first company are not liable for such injury, and that their responsi-

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agreed to carry wool from London to Frome under a stipulation that when the consignees had not room in their own store to receive it, the carriers without additional charge would retain it in their own warehouse until the consignor was ready to receive it, wool thus carried and placed in the carrier's warehouse was destroyed by an accidental fire, it was held that the carriers were not liable. The court say this was a loss which would fall on them as carriers, if they were acting in that character, but would not fall on them as warehouse-men." "This view of the law applicable to railroad companies as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested, it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform, and if on account of their arrival in the night, or at any other time when by the usage or course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot then be delivered, or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them safely under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them, and for the performance of these duties after the goods are delivered from the cars, the company are liable as warehouse-men or keepers of goods for hire." "It was argued in the present case that the railroad company are responsible as common carriers of goods, until they have given notice to the consignees of the arrival of the goods. The court are strongly inclined to the opinion that in regard to the transportation of goods by railroads, as the business is generally conducted in this country, the rule does not apply. The immediate and safe storage of goods on their arrival in warehouses provided by the railroad companies, and without additional expense, seems to be a substitute better adapted to the convenience of both parties."

[15] Stevens *v.* Boston & Maine Railway, 1 Gray, R. 277.

bility terminated, when the marble was taken from their station, that being a virtual delivery to the consignee.[16]

12. Questions of some difficulty often arise, in regard to the custody of goods in warehouse, at intermediate stations, where there is no connection between the different routes over which the goods pass. We shall see that the general duty, in such cases, in *this country especially, is, to carry safely, and deliver to the next carrier upon the route.[17] But cases will occur where there will be delay in effecting the connection. In such cases there can perhaps be no better rule laid down, than that found in the opinion of *Buller*, J., in Garside *v.* Trent & Mersey Nav. Co.[18] which was a case precisely of this character. "The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the goods; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly; and it was only because there was no person ready at Manchester to receive these goods, that the defendants were obliged to keep them."

13. But as a general rule, where the next carrier in the connection has a place of receiving goods, as in the case of railways, always open, and agents ready to receive them, it would probably be the duty of each preceding carrier, to make immediate delivery at the place of receiving freight, to the next succeeding

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[16] Lewis *v.* Western Railway, 11 Met. R. 509. And in Kimball *v.* Western Railway, 5 Gray, it was held that the company were liable for ordinary care and skill in unlading goods from their cars, even in cases, where by their regulations, it was made the duty of the consignees to unlade them within twenty-four hours after their arrival, and this was known to the consignee, who also had notice of the arrival of the goods more than twenty-four hours before the time of their being unloaded by the company's servants, and that if goods were, under such circumstances injured, by the want of such care and skill, the company were liable.

And in the absence of all contract or usage for the consignee to unlade the goods from ships, boats, or cars, and especially where they are bulky, and of great weight, it seems reasonable that the carrier should assume the risk of unlading, under his responsibility as carrier. Such is the general course of the carrying business. The carrier is bound to provide himself with suitable and safe machinery for unlading, and where he used the machinery of third parties, at his own suggestion, for that purpose, he was held liable for its sufficiency. DeMott *v.* Laraway, 14 Wend. 225.

[17] *Post*, § 135, and cases cited.

[18] 4 T. R. 583.

carrier, in the line. And as this fixes, ordinarily, the carrier's liability,[19] in this mode a continuous liability of carriers is kept up throughout the line, which it seems to us is the policy of the law upon this subject, where it can fairly be done, and without injustice to any particular carrier.

14. Difficult questions often arise, too, in this connection, where the goods are directed at an intermediate station, in the course of their transit, to the care of persons, who sustain the double capacity of forwarding merchants and carriers. In such cases they are more commonly held liable as carriers, the consignment being presumed to have been made to them in that capacity.[20]

*SECTION VIII.

GENERAL DUTY OF CARRIERS. EQUALITY OF CHARGES. SPECIAL DAMAGE.

1. *Bound to carry for all who apply.*
2. *May demand freight in advance. Refusal to carry excuses tender.*
3. *Payment of freight and fare will be presumed sometimes.*
4. *What will excuse carrier from carrying, or delivery.*

§ 131. 1. It is a well-settled principle of the law applicable to common carriers, both of goods and passengers, that they are bound to carry for all persons who apply, unless they have a reasonable excuse for the refusal to do so.[1] Carriers of goods and passengers, who set themselves before the public as ready to carry for all who apply, become a kind of public officers, and owe to the public a general duty, independent of any contract in the particular case.[2]

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[19] *Ante*, § 129.

[20] Teall *v.* Sears, 9 Barb. 317. This case is where goods were shipped from Albany upon the canal, with the accompanying bill of lading,—

"Three cases of goods, A. B. Chase, Chicago, by vessel, care of Sears & Griffith, Buffalo," and were received at Buffalo, by Sears & Griffith, who were principally employed in the commission and forwarding business, but had some slight interest in transportation on the lakes, west, and who forwarded these goods to Chicago, by a transient vessel. Suit being brought against them for one case of the goods which did not arrive, it was held that they were liable as carriers and not as forwarding merchants merely.

[1] Benett *v.* Peninsular Steamboat Co. 6 Man. Gr. & Scott, 775; Story on Bail. § 591; Jencks *v.* Coleman, 2 Sumner, R. 221, 224.

[2] Bretherton *v.* Wood, 3 Brod. & B. 54; s. c. 9 Price, R. 408.

2. The carrier is entitled to demand his pay in advance, but, if no such condition is insisted upon at the time of the delivery of the goods, the owner is not obliged to tender the freight, nor in an action is it necessary to allege more than a willingness and readiness to pay a reasonable compensation to the carrier.[3] Where one is bound to perform, upon payment, even though entitled to demand payment in advance, a refusal to perform the act excuses any tender of the compensation. All that is necessary to be averred or proved in such case, is a willingness and readiness to pay when the other party is entitled to demand pay which, in the case of the carrier, is not till he accept the goods and assume the duty of his office.[4]

When, according to the common course of business, carriers do not require pay in advance, freight is not expected to be paid, unless required, in advance, and the omission will not excuse the carrier, * in such cases. Indeed, in one case it was held that the carrier could not rid himself of his common-law liability by waiving compensation, where the right to demand it existed.[5]

3. It is said that payment of fare will be presumed to have been made according to the common course of business upon the route.[6] And, although this has been questioned,[7] it is certain that such an inference, as matter of fact, will be very obvious, in the case of passengers upon railway trains, and we do not perceive any reasonable objection to the rule as one of presumption of fact which, for its force, must depend upon circumstances, to be judged of by the jury.

4. As before stated, a carrier is not bound to receive goods which he is not accustomed to carry, or when his means of conveyance are all employed, or before he is ready to depart[8]—or

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[3] Bastard *v.* Bastard, 2 Shower, 81. It is here said, "For perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire." Lovett *v.* Hobbs, id. 129, and notes; Rogers *v.* Head, Cro. Jac. 262; Jackson *v.* Rogers, 2 Shower, 327, decides the general principle of the carrier being liable to an action if he refuse to carry goods, "though offered his hire" if "he had convenience to carry the same," which seems to presuppose that both are conditions of the liability. Pickford *v.* The Grand Junc. Railway, 8 M. & W. 372.

[4] Rawson *v.* Johnson, 1 East, R. 203; 2 Kent, Comm. 598, 599, and note.

[5] Knox *v.* Rives, 14 Alabama, 249, 261, opinion of court, by *Chilton*, J.

[6] McGill *v.* Rowand, 3 Barr, 451.

[7] 1 Parsons on Cont. 649; *ante*, § 128, n. 11.

[8] *Arguendo*, in Lane *v.* Cotton, 1 Ld. Ray. 652; Morse *v.* Slue, 1 Ventris, 190,

where the property is publicly exposed to the depredations of the mob[9]—or where the goods are not safe to be carried.[10] So, too, the carrier may excuse himself by showing, that the loss happened through the fraud, or negligence, of the owner of the goods in packing, or otherwise, or from internal defect, without his fault.[11] So, if one who was bailee of goods to book them with the defendants, *stage proprietors and common carriers of parcels, to carry to London, but instead of doing so, put them in his own bag, which the defendants lost, it was held he could not recover the value of the parcel.[12] So, too, if the loss happen partly through the negligence of the owner, and partly through that of the carrier, unless, perhaps, where the owners' negligence is not the proximate cause of the loss.[13] The carrier cannot refuse to carry a parcel because the owner refuses to disclose the contents. If accustomed to carry parcels, a carrier is bound to carry packed parcels [which is a bundle made up of smaller ones] according to the terms of the English statute.[14]

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2 Lev. 69. But, if he do accept the delivery, he is liable as a common carrier. Barclay *v.* Cucnlla-Y-Gana, 3 Doug. 389 ; Wibert *v.* N. Y. and Erie Railway, 19 Barb. 36.

[9] Edwards *v.* Sheratt, 1 East, R. 604.

[10] Eng. Stat. 8 & 9 Vict. c. 20, § 105. See also Story on Bailments, § 328 ; 2 Kent's Comm. 599 ; Hodges on Railways, 613 ; Angell on Carriers, § 125.

[11] 2 Greenleaf, Ev. 214 ; Leech *v.* Baldwin, 5 Watts, 446 ; Coxe *v.* Heisley, 19 Penn. R. 243, is where the owner represented the goods to be of much less value than they were, and thereby induced the carrier to exercise less watchfulness in regard to them. Relf *v.* Rapp, 3 Watts & S. 21, is a similar case, where a box of jewelry was put in an ordinary box and marked as glass, and the court held the misrepresentation such a fraud as to excuse the carrier from his common-law liability, even in the case of embezzlement by his servants.

But where goods are directed to be carried in a particular manner, or position, the carrier is bound to regard the direction, and he is liable for all damage resulting from his neglect to do so. Sager *v.* Portsmouth Railway, 31 Maine, 228.

As, where a box containing a bottle of oil of cloves was marked "Glass with care—this side up"—and was lost by disregarding the direction—it was held, this was a sufficient notice of the value and of the contents. Hastings *v.* Pepper, 11 Pick. 41 ; *post*, § 141.

[12] Miles *v.* Cattle, 6 Bing. 743.

[13] Davies *v.* Mann, 10 M. & W. 546 ; Robinson *v.* Cone, 22 Vt. R. 213, and cases referred to in the opinion of the court.

[14] Crouch *v.* The Great N. Railway, 25 Eng. L. & Eq. R. 449. By the 13 & 14 Vict. c. 61, § 14, it is provided that railway companies may make such charges as they may think fit, upon small parcels not exceeding 500 lbs. weight, provided

*SECTION IX.

NOTICE RESTRICTING CARRIERS' RESPONSIBILITY.

1. *Special contract, limiting responsibility, valid.*
2. *Notice, assented to by consignor, has same effect.*
3. *But as matter of evidence, it is received with caution.*
4. *Carrier must show that consignor acquiesced in notice.*
5. *Decided cases. Carriers' Act.*
6. *New York courts held, at one time, that express contract will not excuse the carrier.*
7. *American cases generally hold notice, assented to, binding.*
8. *But in New Hampshire, knowledge of such notice is not sufficient to bind the owner*
9. *Will not excuse for negligence.*
10. *Cases in Pennsylvania.*
11. *General result of all the cases.*

§ 132. 1. The effect of special or general notices, in restricting the general liability of carriers, is one of vast importance,

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that packed parcels forming an aggregate of more than 500 lbs. shall not come under this provision, but it shall apply only to single parcels in separate packages. Under this and similar English statutes it has been held, that if the packages are separate enclosures, although sent upon the same train and of the same kind enough to exceed the weight of 500 lbs., they may still be charged, as parcels, at any rate the companies may fix upon, which shall be uniform to all. Parker *v.* Great Western Railway, 34 Eng. L. & Eq. R. 301. By the English statutes which limit the tonnage rates for railway transportation according to distance, and which are required to be uniform to all, the company may still charge something reasonable in addition, for loading and unloading the goods when they perform that service. Parker *v.* G. W. Railway, ib. And in the same case it is held that the company may make a reasonable allowance to persons or companies for collection and delivery of goods, at stations, or to consignees, when that is part of their undertaking, without infringing the statute requiring uniformity of rates of charges. This subject is somewhat elaborately discussed by the Court of Exchequer, in Crouch *v.* The Great Northern Railway, 34 Eng. L. & Eq. R. 573 [1856], and the cases bearing upon the point, extensively referred to. The only point really decided there is, that it is a question of fact, whether one kind of goods, or one kind of package, is attended with more risk to the carrier than another. The question here was between packed parcels, the mass being addressed to one person, and the separate parcels intended for different persons, and "Enclosures" containing several parcels for the same person. The jury found there was no substantial difference in the risk. See also § 155, *post*, and Pickford *v.* Grand Junction Railway, 10 M. & W. 399; Parker *v.* Great Western Railway, 11 C. B. R. 445, and 8 Eng. L. & Eq. R. 426; Edwards *v.* Great W. Railway, 8 Eng. L. & Eq. R. 447.

An opinion is here intimated that an express carrier, or collector and carrier of parcels, might recover special damage of a railway company who, by failure to perform their duty promptly, should injure his business. And Hadley *v.* Baxendale, 26 Eng. L. & Eq. R. 398, is cited in confirmation of the claim. But it

and has *created a great deal of discussion. We should scarcely be expected to go into the full detail of the whole subject, but

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was considered that the declaration did not cover the claim. The rule in regard to special damages is very correctly defined in Hadley *v.* Baxendale, so far as carriers are concerned. It is there held that, if the carrier is aware of the circumstances of the employer and the extent of the injury likely to occur by delay, and is still culpable, thereby causing delay, he must make good the special damage. But if he is not aware of any unusual circumstances whereby special damages are likely to occur, he is only liable to such general damages as may be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. As, where a miller sent a shaft to be used as a model for casting a new one, and the carrier unreasonably delayed the delivery of it, and consequently, the return of the new one, and the plaintiff's mill, in the mean time, remained idle in consequence, none of these circumstances being known to the carrier, it was held the plaintiff could not recover special damage by reason of his mill remaining idle, and that it was the duty of the judge, in trying the case, to lay down a definite rule by which the jury shall estimate the damages, and to enable the judge to do so, the full court should determine that rule. Blake *v.* Midland Railway, 10 Eng. L. & Eq. R. 437; Alder *v.* Keighly, 15 M. & W. 117; *post*, § 154, n. 2.

In a recent and important case in the House of Lords, Finnie *v.* Glasgow & Southwestern Railway, 34 Eng. L. & Eq. R. 11, the subject of inequality of railway charges, for freight, is learnedly discussed by Lord Chancellor *Cranworth* and Lord *St. Leonards*, two of the most learned and acute lawyers in England, and the surprising diversity of opinion between them upon a subject which, to common apprehension, seems not very difficult of solution, is another confirmation, if any were required, of the necessity of continued discussion in regard to the application of the most familiar principles of the law. In this case, the defendants leased a branch line upon which the plaintiff, a coal owner, resided. The statute applicable to the subject provided, that the rates should be made equal to all persons in respect of goods passing over the same portion of, and over the same distance along, the railway, and under like circumstances; and that no reduction, or advance, should be made, partially, either directly or indirectly, in favor of, or against, any particular person. The rates of charge were higher upon the branch than upon the main line, for the same distance. When the plaintiff sent his coals along the branch he was charged the branch rates; but when they reached the main line, then at the main line rates. But when coal owners living on the main line, sent their coals from the main line upon the branch, they were charged for the whole distance upon both lines, the main line rates. Held, [the two lords differing in opinion,] that this was no violation of the equal rates clause in the statute. But, it was held by Lord *St. Leonards*, that it was a gross violation of such clause. It was doubted by the House, and by *Cranworth*, Lord Chancellor, whether, when one is overcharged in violation of this clause, the money can be recovered back by the party thus overcharged. But Lord *St. Leonards* was clearly of opinion it may be. If it were not for the doubt and the difference of opinion here, and the decision, one could entertain no

we shall state the points established, by the better considered cases upon the subject. It was never made a serious question, in the English law, since the case of Southcote, 4 Co. 83, that any bailee might stipulate for an increased or a diminished degree of responsibility from that which the law imposed upon his general undertaking.

2. And, upon principle, it is difficult to distinguish between an express contract, exonerating the carrier from his ordinary responsibility, and a notice from the carrier, that he would not assume

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serious question of the entire soundness of the opinions expressed by Lord *St. Leonards.*

A railway company cannot discriminate between goods carried partly by water and partly by railway and those carried exclusively by railway, in their fares. Ransome *v.* Eastern Co. Railway, 28 Law T. 339, (Feb. 1857.) But it was said in this case, what is also reported in 38 Eng. L. & Eq. R. 232, that in determining whether a railway company has given undue preference to a particular person, the court may look at the fair interests of the company itself, and entertain such questions, as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton, per mile, than smaller quantities, or for shorter distances, so as to derive equal profits to itself. This latter principle is reaffirmed, in Ransome *v.* Eastern Counties Railway, 31 Law Times, 72, on appeal. And a railway company, who advertised for carrying a certain description of goods, at a lower rate of charge, when sent through certain agents, were restrained, by injunction, from making any such discrimination. Baxendale *v.* The North Devon Railway, 30 Law Times, 134.

And where the proprietor of coal mines was about to construct a railway for the accommodation of the lessees, and abandoned the purpose, upon the public railway entering into an agreement to carry the coal from his pits, at a reduced rate of charge, from what others were required to pay, from the same station for the same route; it was held to be an undue preference. Harris *v.* C. & W. Railw. 30 Law Times, 273.

But in a very recent case, Baxendale *v.* Eastern Counties Railw. 30 Law Times, 320, (Feb. 1858,) it was held, that a railway company were not bound to carry parcels directed to different persons, but delivered to them at the same time, and all to be redelivered to the same person, at the place of destination, at the same rate, as if directed to one person only. The plaintiffs were carriers, who collect parcels from different persons, to be forwarded by them through the railway, to be distributed, on their arrival, to the persons to whom directed. For these parcels, having such direction upon them, and no common mark, and not packed together, the company charged the same rate, as for small parcels delivered by different persons, and not at the lower tonnage rates, charged for heavy goods, or parcels packed and directed to the same consignee; and it was held that the charge was not unreasonable, inasmuch as the parcels having nothing upon them, to show that they were for the same consignees, might impose additional trouble upon the company.

such responsibility, brought home, and assented to, by the owner of goods delivered to be carried. For as the carrier may refuse to carry, and thus subject himself to an action for damages, he may equally, it would seem, undertake to carry upon such terms as his employers are willing to negotiate for, so that, upon principle, a notice brought home to the owner of the goods and assented to, is neither more nor less than a special contract.

3. But a notice, brought home to the owner of the goods, as evidence, merits a very different consideration, in this species of *bailment, from any other, where there is no obligation upon the bailee to assume the duty. In the case of a carrier, with whom it is not optional altogether, whether to carry goods offered, or not, but where he must carry such goods as he is accustomed to carry, upon the general terms of liability, imposed by the law, or submit to an action for damages, and where every one, desiring goods carried, has the option, to have them carried, without restriction of the carrier's duty, unless he choose to waive some portion of his legal rights, for present convenience, or ultimate peace; the mere fact of such a notice, restricting the carrier's liability, being brought home to the knowledge of the owner of goods, before or at the time of depositing them with the carrier, is no certain ground of inferring, whether the carrier consented to recede from his notice and perform the duty, which the law imposes upon him, or the owner of the goods consented to waive some portion of his legal rights.

4. Perhaps, upon general grounds of inference, it might be regarded as more logical, and more reasonable, to infer, that the carrier receded from an illegal pretension, than the owner of the goods from a legal one. At all events, to exonerate the carrier from his general liability, he must show, at the least, it would seem, that the owner assented to the demands of the notice, or acquiesced in it, by making no remonstrance.

5. It will be found, that the decided cases mainly coincide with these general propositions.[1] The English statute, the Carriers'

[1] Nicholson *v.* Willan, 5 East, 507, is one of the earliest cases, where the mere fact of notice is treated as equivalent to an express contract, and this is upon the presumption, that it was assented to by the owner of the goods, who seems to have been present, at the time the goods were deposited, and to have been made aware of the notice. Nothing is said of any remonstrance upon his part. This notice, it will be observed, is only that packages, above the value of £5, must be disclosed,

Act,[2] requires the owner of goods of great value, in small compass, enumerated in the act, which is very extensive, to declare to the carrier, at the time of delivery, the contents of the parcels, and *pay the requisite price, or the carrier is exonerated from liability.

6. In the state of New York, the courts at one time held, that it is not competent for carriers to exonerate themselves from their general liability, either by notices brought home to the owner of goods, at the time they are deposited for carriage, or by express contracts to that effect even.[3]

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and insured as such. This notice seems nothing more than a regulation of their business, to enable them to know the value of their parcels, and to demand pay accordingly, which all carriers may now do, by statute, in England and in this country, by general usage.

In Riley *v.* Horne, 5 Bing. 217, Ch. J. *Best* shows, very conclusively, the reasonableness and justice of allowing carriers to require, by general notices, of those who bring goods or parcels, to disclose the contents, and to demand pay in proportion to their value, by way of insurance. Wyld *v.* Pickford, 8 M. & W. 443, seems to decide the same.

[2] 11 George 4 & 1 Will. 4, ch. 68.

[3] Cole *v.* Goodwin, 19 Wend. 251; Hollister *v.* Nowlen, 19 Wend. 234; Gould *v.* Hill, 2 Hill, R. 623. But see also Fish *v.* Chapman, 2 Kelly, 349; Jones *v.* Voorhies, 10 Ohio, 145; Dorr *v.* The N. J. Steam Nav. Co. 1 Kernan, 491. The New York courts seem to have adhered to the case of Hollister *v.* Nowlen. Cam. & Am. Railway *v.* Belknap, 21 Wend. 354; Clark *v.* Faxton, id. 153; Alexander *v.* Greene, 3 Hill, 9; 7 id. 533; Powell *v.* Myers, 26 Wend. 594. But the case of Gould *v.* Hill, in which it was held, that the carrier could not exonerate himself from his common-law responsibility, by a special contract, has been deliberately overruled, in two cases. Parsons *v.* Monteith, 13 Barb. 353; Moore *v.* Evans, 14 Barb. 524.

And in Dorr *v.* N. J. Steam Nav. Co. 1 Kernan, 491, in the Court of Appeals, *Parker*, J., says: "I am not aware, that Gould *v.* Hill has been followed in any reported case."

In Wells *v.* Steam Nav. Co. 2 Comst. 209, *Bronson*, J., who seems to have concurred in the decision of Gould *v.* Hill, says: "It is a doubtful question;" and *Parker*, J., in Dorr *v.* N. J. Steam Nav. Co., *supra*, says: "That a carrier may by express contract, restrict his common-law liability, is now, I think, a well-established rule of law. It is so understood in England. Aleyn, 93; 1 Ventris, 190, 238; Peake's N. P. C. 150; 4 Burrow, 2301; 1 Starkie, 186; 8 M. & W. 443; 4 Co. 84; and in Pennsylvania, 16 Penn. 67; 5 Rawle, 179; 6 Watts & S. 495. In other states where the question has arisen, whether notice would excuse the liability of the carrier, it seems to have been taken for granted, that a special acceptance would do so; and in N. J. Steam Nav. Co. *v.* Merchants Bank, 6 How. 382, it was so held, by the Supreme Court of the United States."

*7. But most of the American cases admit, that carriers may restrict their general liability, by notices, brought home to the

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The Superior Court of the city of New York had adopted a similar view, in the same case. 4 Sandf. 136; and in Stoddard *v.* Long I. Railway, 5 Sandf. 180.

The following cases may also be here referred to as holding the general doctrine upon this subject. Swindler *v.* Hilliard, 2 Rich. 286; Camden & Amb. Railway *v.* Baldauf, 16 Penn. R. 67; Reno *v.* Hogan, 12 B. Monr. 63; Farm. & Mech. Bank *v.* The Champ. Trans. Co. 23 Vt. R. 186; Barney *v.* Prentiss, 4 Har. & Johns. 317.

As the result of all the cases upon the subject, and of true policy and sound principle, it must be admitted that a carrier may relieve himself from his duty to insure the safe arrival of the goods at their destination, by a special contract to that effect, or what is equivalent, that a special notice to that effect, brought home to the mind of the owner of the goods, at the time of delivery, or before, and no objection made to it, will have the force of a special contract, according to the English cases, but that according to many of the American cases, some further evidence of assent, on the part of the owner, is requisite. Opinion of *Isham*, J., in Kimball *v.* Rut. & B. Railway, 26 Vt. R. 247. If a different rate of charge is made, the election of the lower rate is an assent to the notice.

The language of *Nelson*, J., in New J. Steam Nav. Co. *v.* The Merchants Bank, 6 Howard, U. S. R. 344, is perhaps a fair exposition of the American law upon the subject. "He (the carrier) is in a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself, without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in Hollister *v.* Nowlen, that if any implication is to be indulged, from the delivery of the goods under the general notice, it is as strong, that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation, by parol, or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication, or inference, founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

To the same effect is the opinion of the court in Farmers & M. Bank *v.* The Champlain Transp. Co. 23 Vt. R. 186, 205. "We are more inclined to adopt the view, which the American cases have taken of the subject of notices, by common carriers, intended to qualify their responsibility, than that of the English courts, which they have, in some instances, subsequently regretted. The consideration, that carriers are bound, at all events, to carry such parcels, within the general scope of their business, as are offered to them to carry, will make an essential difference between the effect of notices by them, and by others, who have an option in regard to work which they undertake. In the former case, the

knowledge of the owner of the goods, before, or at the time, of delivery to the carrier, if assented to by the owner, which is but another form of defining an express contract, which seems to be everywhere recognized, as binding upon those contracting with carriers, unless New York may form an exception.[4]

*8. But it was held that the owner of goods delivered at the station-house of the railway, to be carried from Dover to Boston, and which were consumed by an accidental fire, at the former place, was not precluded from recovery of the value of the goods, by a general notice of the company, known to the plaintiff at the time of the delivery of his goods, that all goods would be at the risk of the owners while in the defendants' warehouse.[5]

9. And in another case it was held that a paper exonerating the company from all liability to the plaintiff for damage, which might happen to any horses, oxen, or other animals, he might send by their railway, did not exonerate them from liability for negligence.[6]

10. In Pennsylvania the rule of the English law that a carrier may restrict his liability, by a special acceptance, seems to be firmly established notwithstanding some misgivings expressed by the courts in regard to the good policy of such a rule. The more prominent cases upon the subject, are referred to in the opinion of the court, in Dorr *v.* N. J. S. Nav. Co.[7]

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contractor, having no right to exact unreasonable terms, his giving public notice that he shall do so, where those who contract with him are not altogether at his mercy, does not raise the same presumption of acquiescence in his demands, as arises in those cases, where the contractor has the absolute right to impose his own conditions. And unless it be made clearly to appear, that persons contracting with common carriers, expressly consent to be bound by the terms of such notices, it does not appear to us, that such acquiescence ought to be inferred."

And a notice restricting the carrier's liability for baggage, "printed on the back of the passage ticket, and detached from what ordinarily contains all that it is material for the passenger to know, does not raise a legal presumption, that the party had knowledge of the notice before the train left. That is a question for the jury." Brown *v.* Eastern Railway Co. 11 Cush. R. 97.

[4] New J. Steam Nav. Co. *v.* Merchants Bank, 6 How. U. S. R. 344; Sager *v.* The P. S. & P. Railway Co. 31 Maine, 228; Bean *v.* Green, 3 Fairfield, 422. Cooper *v.* Berry, 21 Ga. R. 526.

[5] Moses *v.* Boston & Maine Railway, 4 Foster, 71; *ante*, § 130, n. 13.

[6] Sager *v.* P. S. & P. Railway, 31 Maine, 228.

[7] 1 Kernan, 491; Atwood *v.* The Reliance Co. 9 Watts, 87; Bingham *v.* Rogers, 6 Watts & Serg. 495; Laing *v.* Colder, 8 Penn. R. 479.

11. It would seem then to be the result of the decisions everywhere, that carriers may limit their common-law responsibility, as insurers, by special contract, at the time of acceptance, and that a notice to that effect brought home to the knowledge of the owner of the goods, at the time, or before the delivery of the goods, and assented to by him, or against which he makes no remonstrance, or objection perhaps, will have the same effect, in general, with such exceptions, limitations, and qualifications, as reason and justice may require, to be judged of by the court and jury, with reference to the circumstances of each particular case.[8]

*SECTION X.

NOTICE, OR EXPRESS CONTRACT, LIMITING CARRIERS' LIABILITY.

1. *Written notice will not affect one, who cannot read.*
2. *Carrier must see to it that his notice is made effectual.*
3. *Must be shown that knowledge of notice came to consignor.*
4. *But former dealings with same party may be presumptive evidence.*
5. *Carrier cannot stipulate for exemption from liability for negligence.*
6. *But carrier may be allowed to stipulate for exemption from responsibility as an insurer.*

7, 8, 9, 10, 11, and 12. *Review of the cases favoring this proposition.*

13, 14, and n. 17. *Review of English cases bearing in opposite direction.*

§ 133. 1. The courts have, from time to time, been accustomed to engraft such exceptions, in regard to the effect of carriers' notices, as seemed necessary to render their operation reasonable and just. It was held that such notice could have no effect, by being posted upon the office of the carrier, if the owner of the goods or the party who delivers them at the office cannot read.[1]

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[8] The English statute, 17 & 18 Vict. c. 31, § 7, defines the effect of these notices of carriers in England, which is considered more at length under § 140. The latest English case, upon this point, Simons *v.* Great Western Railway, [May, 1857], 29 Law Times, 182, holds, that a notice, signed by a person, who cannot read, and who is told by the clerk of the company that it is mere form, is not binding, as a contract. Cooper *v.* Berry, 21 Ga. R. 526.

[1] Davis *v.* Willan, 2 Starkie's cases, 279. *Abbott*, J., here says a notice to have effect, must be brought "plainly and clearly to the mind of the party, who deals with them." "It may happen that the party cannot read, and if it so happen, it is the misfortune of the carrier, or his fault, that he does not communicate his intention by some other means."

2. In another case where the party delivering the goods, could read, and had seen the carrier's notice, upon a board hanging in the office, but *not supposing* it interested him, had, in fact, never read it, it was held he was not affected by it. Lord *Ellenborough* said, at the trial, "You cannot make this notice to this *non-supposing* person." "The hardship of the case cannot alter the liability of the party." The rule is here laid down by this learned and sensible judge, that the carrier must see to it that he adopts such a medium of notice that the party with whom he deals shall be "effectually apprised of the terms upon which he proposes to deal."[2]

3. And it was held the notice was insufficient, if the advantages * of the mode of carriage were stated in large letters, and the conditions and exemptions in small letters.[3] So, too, if the printed notice be in a place where the party would not ordinarily see it, in the mode in which he came to the office, it could have no effect upon the liability of the carrier.[4] So, too, where the goods were delivered at a station where no notice was put up although notices were put up at each terminus of the route.[5] All this shows very clearly that such notices by printed cards, or inserted in newspapers are not sufficient, unless it be shown that

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[2] Kerr *v.* Willan, 2 Starkie, 53. When the case came before the full bench, on motion for new trial, the court said, in regard to the duty to make the notice effectual, "If the agent could not read, he might be able to hear, or, at all events, a handbill might be delivered to him, to be taken to his principal." The rule of law might be superseded, by special contract, but it must be proved, and whether it exist or not is always a question for the jury.

[3] Butler *v.* Heane, 2 Campb. 415.

[4] Walker *v.* Jackson, 10 M. & W. 161; Gouger *v.* Jolly, 1 Holt, N. P. C. 317.

[5] 1 Holt, N. P. C. 317. *Gibbs*, Ch. J., says, "The carrier is liable, unless express notice is brought home to the plaintiff." This is the ground assumed in all the cases. Beekman *v.* Shouse, 5 Rawle, 179; Bean *v.* Green, 3 Fairfield, 422; Story on Bailments, § 558; Brooke *v.* Pickwick, 4 Bing. 218. *Best*, Ch. J., here lays down the rule, in regard to notices, that it is not enough to post them up in a conspicuous place in the office of the carrier. But they must be at the pains *to make the customer understand* the restrictions which they propose to claim upon their responsibility. This we think the only safe rule, in regard to notices by carriers. And unless this be clearly shown, the leaving the goods, without objection, seems to be no ground whatever of presuming against the owner. And even with this, it is still a question for the jury, whether he expected to be bound by it, or, in other words, whether he supposed, at the time, that the carrier so understood the matter. *Ante*, § 132, 133.

knowledge of the contents of such notices came to the party, and this is always a question for the jury.[6]

4. But the carrier may give evidence of the manner of transacting similar previous business, between him and the plaintiff, as presumptive evidence of notice, and an implied special acceptance in this particular case.[7]

* 5. But notwithstanding such notice, that parcels are to be at the risk of the owner, and this assented to by the owner, the cases chiefly agree that the carrier is still liable for gross neglect,[8] and many of the earlier and best considered English cases, regard such notices as having no reference whatever to the ordinary risks of transportation, but as only intended to relieve the carrier from those extraordinary responsibilities which the common law had imposed upon this class of bailees. And it cannot be denied that this view of the subject has very much to commend it to our favorable consideration. There is certainly something very incongruous, and not a little revolting to the

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[6] Clayton *v.* Hunt, 3 Campb. 27; Rowley *v.* Horne, 3 Bing. 2. In this case the defendant proved that the plaintiff had regularly taken a weekly newspaper, in which his advertisements were constantly inserted, for over three years. The jury having found a verdict for plaintiff for the full loss sustained, the full bench refused a new trial. They said it could not be intended a party read all the contents of any newspaper he might take. The carrier should fix upon the party a knowledge of the notice, and this he might easily do, by delivering to each one who brought a parcel a printed copy of such notice.

[7] Roskell *v.* Waterhouse, 2 Starkie, 461. In this case, the evidence was that the plaintiff had sent similar parcels by defendant, which had been lost, and no action brought for the loss. Mayhew *v.* Eames, 3 B. & C. 601. In this case the principals had previous parcels sent by the same carriers, and had received at such times their printed notices, and the court held that sufficient notice to them, in this case, notwithstanding their agent, in this particular case, delivered the parcel to the carriers, without any knowledge that they had given notice that they would not be responsible for bank-notes, unless entered and paid for accordingly. The court say the principals should have apprised their agents of this notice, and not to send by them without insuring.

Notice to the principals in another transaction is good in this, but not so of notice to the agents. Notice to the agents, in order to bind the principals, must be in the same transaction. The principal and agent, so far as the same transaction is concerned, are to be regarded, for purposes of notice, as identical. Fitzsimmons *v.* Joslyn, 21 Vt. R. 140, 141, 142, opinion of the court.

[8] *Post*, § 134, n. 9, 10, 11, 12, 13, 14, 15, 16, 17. See also Farmers' & Mechanics' Bank *v.* Champlain Transportation Co. 23 Vt. R. 205, opinion of the court upon this point, and cases cited.

moral sense, that a bailee for hire should be allowed to stipulate for exemption from the consequences of his own negligence, ordinary or extraordinary. A laborer, domestic, or mechanic, who should propose such a stipulation, would be regarded as altogether unworthy of confidence in any respect, and the employer, who should submit to such a condition, must be reduced to extreme necessity one would suppose. We could scarcely believe that any competent tribunal would, for a moment, entertain such a proposition, if we did not know that the ablest courts in Westminster Hall had done so.

6. But that a carrier by steamboat or railway, or indeed, in any other mode, should be allowed to stipulate for exemption from insurance of the goods, or else demand a premium, and specification, as in other cases of insurance, seems highly just and reasonable.[8]

7. In Duff *v.* Budd,[9] the carrier was held liable for delivering a box to a wrong person, notwithstanding a notice that he would not be liable for parcels of that description, the judge directing the jury that the carriers' negligence had been such as to render it unnecessary *to consider the question of the notice, and the full bench, on argument, refused a new trial.

8. And in Garnett *v.* Wilan,[10] where the carrier delivered the parcel to another line of carriers, and it was lost before it reached its destination, it was held, notwithstanding a similar notice, the first carrier was liable. In both these cases, the carrier was held liable as for gross negligence. And Beck *v.* Evans,[11] was decided upon the same ground, and involves the very same point.

9. In Bodenham *v.* Bennett,[12] it was held, that such notices are only intended to exempt carriers from extraordinary events, and in the language of Baron *Wood*, "were not meant to exempt from due and ordinary care."

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9 3 Brod. & Bing. 177.

10 5 Barn. & Ald. 53. And in such case the jury having found that the risk was increased by the change of carriers, the first carrier is liable, even where he was *deceived* as to the value of the parcel. Sleat *v.* Fagg, 5 B. & Ald. 342; *post*, note 14, § 133.

11 16 East, R. 244; Smith *v.* Horne, 8 Taunt. R. 144, is to the same effect. So also is Reno *v.* Hogan, 12 B. Monroe, 63.

12 4 Price, R. 31; Birkett *v.* Willan, 2 B. & Ald. 356, is decided upon the authority of Bodenham *v.* Bennett, and holds that such notice, assented to by the owner of the goods, will not excuse the carrier for gross negligence.

10. In Batson *v.* Donovan,[13] *Best*, J., said, "The only effect of the notice is that employers are informed that carriers will not be insurers of goods above a certain value, unless paid a reasonable premium of insurance." And the learned judge insists with great earnestness, that the carrier and his servants must, in cases of this kind, notwithstanding the notice, assented to by the owner of the goods, "take the same care of them that a prudent man would take of his own property," which seems just and reasonable. But the majority of the court held in this case, (*Best*, J., *dissentiente*,) that the plaintiff by delivering a box containing bills, checks, and notes, to the value of £4,072, without intimating that the contents were valuable, when he knew that the carrier expected a premium for insurance in such cases, was guilty of such fraud and deception as to preclude a recovery, except for such gross neglect as would be reprehensible if the parcel had been of less value than £5, the limit named in the carrier's notice. And we see no reason to question the soundness of the grounds upon which the case is put,[14] and it seems

[13] 4 Barn. & Ald. 21.

[14] See *post*, § 140, and cases cited.

Some of the early cases do not seem to regard a deception in reference to the contents of a parcel delivered to a carrier, as excusing the carrier from his common law liability of insurer, there being no notice from the carrier in regard to being informed of the contents of valuable parcels. Kenrig *v.* Eggleston, Aleyn, 93. So in the case from 1 Ventris, 238, cited by Lord *Mansfield*, in Gibbon *v.* Paynton, 4 Burrow, R. 2298. But his lordship, who saw through all disguises, dissents emphatically from any such rule of responsibility, and indorses the case of Tyly *v.* Morrice, Carthew, 485, as "being determined on the *true* principles that the carrier was liable *only* for what he was *fairly told of*."

In this last case two bags were delivered to the carrier sealed up, said to contain £200, and receipted accordingly with a promise to deliver to T. Davis, he to pay 10*s.* per cent. for carriage and *risk*. The carrier was robbed, and the chief justice was of opinion the plaintiff should only recover for £200, the undertaking being for £200, and the reward only for that sum. And "since the plaintiff had taken this course to *defraud the carrier of his reward*, he had thereby barred himself of that remedy which is *founded only on the reward*." And we do not see why this old rule, from Carthew, adopted by Lord *Mansfield*, in his opinion in this case, (Gibbon *v.* Paynton,) does not contain the essence of the law upon this point at the present time.

The case of Gibbon *v.* Paynton was that of £100 in gold, put in an old nail bag, and that filled with hay to give it a mean appearance, and no intimation given to the carrier of its value; the bag and hay arrived safe, but the money was gone. The jury found a verdict for defendant, and the court unanimously denied a new trial.

to us entirely consistent with the general views assumed by *Best*, J.

*11. The general rule of law upon this point is well stated by Baron *Parke*.[15] "The weight of authority seems to be in favor of the doctrine, that in order to render the carrier liable, after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence, gross negligence in the sense in which it has been understood in the last mentioned cases, [Batson *v.* Donovan, and Duff *v.* Budd.] And the effect of such notice is, that the carrier will not be responsible, at all events, unless he is paid a premium,—but still he undertakes to carry,—and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage. And after such notice it may be that the burden of proof of damage or loss by want of such care, would lie upon the plaintiff."

12. This seems to be placing the effect of such notices upon a reasonable basis, and most of the American cases will be found to have adopted, in the main, similar views. The United States Supreme Court, in a case[16] of great importance, assume this

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15 Wyld *v.* Pickford, 8 M. & W. 443. Hall *v.* Cheney, N. H. Sup. Ct. June Term, 1857, 20 Law Rep.

16 New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344. This was a case where an express carrier, by special contract with the company, was allowed to carry a certain crate upon their boats, under the care and oversight of the express-man, with the express stipulation that all persons delivering parcels, to be carried by express, should be furnished with the following notice, annexed to the receipt or bill of lading executed for the goods; and that it should also be annexed to his advertisements, published in the public prints, or elsewhere: "Take notice, William F. Harnden is alone responsible for the loss or injury of any articles or property, committed to his care, nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it, or its contents, at any time."

Mr. Harnden collected $20,000 in specie, in the city of New York, for the Merchants' Bank, Boston, and was transporting it to the bank, on board the Lexington, one of the company's boats, at the time it was burned in the Sound, through the gross mismanagement of the company's agents, and the specie lost.

Mr. Justice *Nelson*, in giving the opinion of the court, said: "The special agreement in this case under which the goods were shipped, provided, that they should be conveyed at the risk of Harnden, and that the respondents were not

ground, *in terms. The opinion of Mr. Justice Nelson is worthy of consideration upon this point.

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to be responsible to him, or to his employers, in any event, for loss or damage The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the sea-worthiness of the vessel, her proper equipment and furniture, or in her management by the master and hands. This is the utmost effect that was given to a general notice, both in England and in this country, when allowed to restrict the carrier's liability, although as broad and absolute in its terms as the special agreement before us (Story on Bailments, § 570); nor was it allowed to exempt him from accountability, for losses occasioned by a defect in the vehicle, or mode of conveyance used in the transportation. Although he was allowed to exempt himself from losses arising out of events and accidents against which he was a sort of insurer, yet inasmuch as he had undertaken to carry the goods, from one place to another, he was deemed to have incurred the same degree of responsibility, as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles, and means of conveyance, for their transportation. This rule, we think, should govern the construction of the agreement in question."

The same view is adopted in the following cases: Clark *v.* Faxton, 21 Wend. 153; Dorr *v.* N. J. Steam Nav. Co. 4 Sand. 136; Parsons *v.* Monteith, 13 Barb. 353; Stoddard *v.* The Long Island Railway, 5 Sand. 180; Fish *v.* Chapman, 2 Ga. R. 349. Most of the American cases have maintained the principle, that a carrier cannot, by special notices, brought to the knowledge of the owner of the goods, or by contract even, exempt himself from the duty to exercise ordinary care and prudence in the transportation of freight and baggage. Sager *v.* Portsmouth, S. P. & E. Railway, 31 Maine R. 228; Camden & Amboy Railway *v.* Bauldauff, 16 Penn. R. 67; Laing *v.* Colder, 8 Barr, 479; Bingham *v.* Rogers, 6 Watts & Serg. R. 500.

The case of Camden & Amboy Railway *v.* Baldauff, was that of a German, who could not read English. The railway advertised that they would carry fifty pounds baggage for each passenger, and that passengers are "expressly prohibited from taking any thing, as baggage, but their wearing apparel, which will be at the risk of the owner." The plaintiff had, in a trunk with his ordinary baggage, two thousand one hundred and one five-franc pieces. He paid for extra weight, and gave it in charge of the proper servant of the railway. The trunk was lost.

The court held the company liable on two grounds: 1. They have failed to show the manner of the loss, and the law presumes negligence, from the loss. 2. They have failed to show, that the contents of their notice came to the knowledge of the plaintiff, which leaves them liable, as insurers, at common law.

*13. But some of the later English cases, before the late statute, the Railway and Canal Traffic Act of 1854,[17] had departed

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In giving judgment, the court, *Rogers*, J., say: "They undertake to carry for hire, and by the very nature of their employment, to bestow, for the preservation of the goods, at least the ordinary care of a bailee for hire. From this duty I have no hesitation in saying, they cannot discharge themselves, even by a special agreement with the owner. Such a stipulation would be void, being against the policy of the law. There is no principle in the law better settled, than that whatever has an obvious tendency to encourage guilty negligence, fraud, or crime, is contrary to public policy. Such, in the very nature of things, would be the consequence of allowing the common carrier to throw off the obligation which the law imposes upon him, of taking at least ordinary care of the baggage, or other goods, of a passenger. Under such a regulation, no man's property would be safe. Cole *v.* Goodwin, 19 Wend. 251; Atwood *v.* The Reliance Co. 9 Watts, 87."

And in The Penn. Railway *v.* McCloskey, 23 Penn. 532, the court say, in giving judgment: "Assuming that a public company of carriers may contract for other exemption from liability, than those allowed by law, still such a contract will not exempt from liability for gross negligence." And in Baker *v.* Brinson, 9 Rich. 201, it is decided, that where a carrier limits his liability, by special contract, the *onus* is upon him to show, that the loss is within the exception, and that he was guilty of no negligence. See also, to same effect, Graham & Co. *v.* Davis, 4 Ohio St. R. 362. See also Baldwin *v.* Collins, 9 Rob. (Louis.) R. 468. Newstadt *v.* Adams, 5 Duer, 43.

[17] *Post*, § 135, and notes.

In Austin *v.* The Manchester, S. & L. Railway, 11 Eng. L. & Eq. R. 506, the defendants let their trucks to the plaintiff, for the conveyance of certain horses, by the defendants' engines, along their railway, and delivered to the plaintiff a ticket, or notice, to the effect, "that the charge was for the use of the carriages, and the locomotive power only, and that the plaintiffs were to see to the efficiency of the carriages, before they allowed their horses, or live-stock, to be placed therein, that the defendants would not be responsible for any alleged defects in their carriages, unless complaint was made, at the time of booking, or before the same left the station, nor for any damages, however caused, to horses," &c. It was held that the plaintiff could not recover for damage done to his horses, in the transportation, through the breaking of an axletree, which was attributable to the culpable negligence of the company's servants.

Cresswell, J., in delivering judgment, said: "In the largest sense those words might exonerate the company for damage done wilfully, a sense in which it was not contended they were used, in the contract; but giving them the most limited meaning, they must apply to all risks of whatever kind, and however arising, to be encountered in the course of the journey, one of which is undoubtedly the risk of a wheel taking fire, owing to neglect to grease it. Whether that is called negligence merely, or gross negligence, or culpable negligence, or whatever other epithet may be applied to it, we think it is within the exemption from responsibility provided by the contract."

essentially from *the basis, upon which the earlier cases, in regard to notices, in that country, rested.

It was held, too, in Chippendale *v.* The Lan. & Yorkshire Railway, 7 Eng. L. & Eq. R. 395, that in a case where the owner of cattle transported on defendants' railway, saw them put in the carriages, and signed a ticket, with this condition annexed, "The owner undertaking all risks of conveyance whatever," that there was no implied stipulation, that the carriage should be fit for the conveyance of the cattle. And in Carr *v.* same defendants, 14 Eng. L. & Eq. R. 340, (1852,) upon a similar contract, where plaintiff's horse was injured, by the horse-box being propelled against some trucks, through the gross negligence of the company, it was held, (*Platt*, B., *hesitante*,) that the company were not responsible.

The grounds of the decision are stated very fully in the opinion of *Parke*, B.: "The jury have found that the defendants have been guilty of gross negligence, and that must be taken as a fact. In my opinion the owner of the horse has taken upon himself the risk of conveyance, the railway company being bound merely to find carriages and propelling power; the terms of the contract appear to me to show this. The company say they will not be responsible for any injury or damage (howsoever caused) occurring to live-stock of any description, travelling upon their railway. This, then, is a contract by virtue of which the plaintiff is to stand the risk of accident or injury, and certainly, when we look at the nature of the things conveyed, there is nothing unreasonable in the arrangement. In the case of Austin *v.* The Manchester, Sheffield & Lincolnshire Railway Company, 5 Eng. L. & Eq. R. 329, the language of the contract was different from the present, but not to any great extent. [His lordship stated the case.] In that case, the accident was occasioned by the wheels not being properly greased; in the present case, the carriage that contained the plaintiff's horse was driven against another carriage. We ought not to fritter away the meaning of contracts merely for the purpose of making men careful. That is a matter that we are not bound to correct. The legislature may, if they please, put a stop to contracts of this kind, but we have nothing to do with them except to interpret them when they are made." But the opinion of Baron *Platt* seems to us far more consonant with reason and justice, and with the principle of the decided cases, both English and American. The learned Baron says, "The declaration states that the defendants were guilty of gross negligence, and that fact was proved. The *gravamen* of the charge is the gross negligence. [His lordship read the notice.] Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly, horses were seldom carried, but now they are ordinarily conveyed by the trains. It is, therefore, said that new stipulations are necessary to guard carriers from the risks which are incidental to this new mode of conveyance. It is suggested that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes, and that, unless we take upon ourselves the office of legislation, this ticket absolves the carriers from all responsibility. I own I am startled at such a proposition, and considering the high authority by which it is supported, I feel I ought to doubt and to distrust my own opinion. But I am bound to say, that I am not satisfied that the language of this ticket absolves the railway company from all liability for damage. I cannot help

*14. We have arranged these cases in a note, at the end of this section, as a remarkable illustration of the tendency of judicial

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thinking that the owner of the goods never dreamed of such a thing when he signed this contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occurred whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this contract." And in McManus *v.* Lancashire & Yorkshire Railw. 30 Law Times, 321, the same rule is maintained as in Chippendale *v.* Lon. & Yorkshire Railway, so late as January, 1858.

In the late case of Wise *v.* The Great Western Railway, 36 Eng. L. & Eq. R. 574, where a horse was delivered to defendants to be carried to W., and the person delivering it signed a writing, agreeing to abide by a notice contained in it, that the directors would not be answerable for damage done to any horses conveyed by the railway, and the horse reached the station at W. safely, but the company's servants either did not notice it, or forgot that the horse had arrived, and upon the plaintiff's calling for it, the next day, it was discovered in a horse-box on the siding, and found to have sustained serious injury, from cold, and remaining in a confined position all night: Held, that the company were protected under the statute, by the signed contract. And it would seem, that in such case the company would not be liable independent of the contract, the first fault being, plaintiff's not being there to receive the horse, upon its arrival at the station. See *ante*, § 130.

It does not seem to be regarded as important, that the owner of the goods should sign any writing, or indeed that he should even receive a printed ticket, or notice of terms of carriage; but if he is, in any way, made aware of the terms, upon which the carrier expects to receive his goods, and consents to deliver them, without the carrier, or some one authorized to act upon his behalf, distinctly receding from the terms of the notice, he is bound by it. The York, Newcastle & B. Railway *v.* Crisp, 25 Eng. L. & Eq. R. 396. In the case of Walker *v.* The York & North M. Railway Co. 22 Eng. L. & Eq. R. 315, the owner of the goods distinctly informed the station-agent, that the company's notice was not binding upon him. Yet inasmuch as the notice itself stated, that neither the station-clerk, nor other servants of the company had any authority to alter or vary the terms of the notice, the court held the plaintiff bound by these terms, one of which was, that the company were not to be responsible for the delivery of fish in any certain or reasonable time, nor in time for any market, nor for any loss or damage arising from any delay or stoppage, &c.

The learned judge, at the trial, told the jury, that if the plaintiff had been served with the notice, and afterwards forwarded the fish, they ought to infer an agreement on his part, to be bound by the terms of the notice, unless there appeared an unambiguous refusal on his part, to be bound by the notice, and an acquiescence by the company in that refusal. It was held by the full bench that the direction was right. See also Morville *v.* Great Northern Railway, 10 Eng. L. & Eq. R. 366; Willoughby *v.* Horridge, 16 Eng. L. & Eq. R. 437; 12 C. B. 742; Crouch *v.* London & N. W. Railway, 21 Law J. 207.

*administration, to bewilder and to delude the wisest and the most profound, when they suffer themselves to be seduced into the belief, that it is safe to follow any theory or abstraction, however specious, a moment longer, than its results commend themselves to our sense of justice, certainly, after they begin most unequivocally to excite sentiments of a more painful character, as many of the English decisions, upon the subject of carriers' exemption from liability, even for gross neglect, and wilful misconduct, could scarcely fail to do, when it is borne in mind that the entire business population of the realm almost was at the mercy of these same carriers. It is surely not to be regarded as matter of surprise, that the legislature felt compelled to interfere, to restore something of the reasonable responsibility of common carriers.[17]

Under the late English Railway and Canal Traffic Act, if the *carrier refuse to receive the goods, unless the owner assent to certain conditions which the judge trying the case considers reasonable, and the goods are left on these conditions, the carrier

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And the case of Fowles *v.* The Great Western Railway Co. 16 Eng. L. & Eq. R. 531, although determined upon a question of variance, clearly assumes the ground, that a carrier's notice will exonerate him from his general obligation. York, Newcastle & Berwick Railway *v.* Crisp, 25 Eng. L. & Eq. R. 396.

But the late case of Hearn *v.* The London & S. W. Railway, 29 Eng. L. & Eq. R. 494, (1855,) seems to manifest, in some respects, a disposition in the English courts to hold common carriers to something like reasonable accountability, which some of the later cases had apparently regarded as nearly hopeless, under their most extraordinary notices. But we shall refer to this case more at length under § 140, where the present state of the English law is stated.

Many of the latter cases in this country seem still disposed to hold the carrier to his common-law liability, unless he show a special contract to exonerate him from it, or a notice brought home to the owner of the goods, and assented to by him. *Ante*, § 132, n. 3; § 133, n. 16; and even in that case, he is still responsible for ordinary care.

And if a loss occur, in a case where the carrier is exempted, by special contract, from certain risks, the burden of proof is upon the carrier to show, that the loss occurred in consequence of such excepted risks. Davidson *v.* Graham, 2 Ohio St. R. 131. See also Slocum *v.* Fairchild, 7 Hill, 292; Whiteside *v.* Russell, 8 Watts & S. 44; Brinson *v.* Baker, 9 Rich. 201.

But it was held that where gold dust was received on board a steamboat, with express notice from the clerk of the boat, that he would receive it only upon express condition that no charge was to be made, and no responsibility incurred, and the dust was stolen from the boat, without any negligence on the part of the officers of the boat, the owners were not liable. Fay *v.* Steamer New World, 1 Cal. R. 348.

is not liable as a common carrier, but only upon the special undertaking.[18]

SECTION XI.

NOTICES AS TO ORDINARY AND EXTRAORDINARY RESPONSIBILITY OF CARRIERS.

1. *American writers and cases adopt this distinction.*
2. *The English cases do not seem to recognize it.*

§ 134. 1. Many of the American writers, and some of the American courts, point to a distinction between notices of carriers, which propose to exonerate the carrier from all liability, even for gross neglect, and possibly for positive misfeasance and wrong, and such as have reference only to exemption from that extraordinary responsibility, imposed by the common law, by which they become insurers.[1] This distinction is pointed out by Prof. Greenleaf,[2] and adopted by Mr. Angell in his treatise on Carriers.[3]

* And Prof. Parsons, in his treatise upon contracts has an elaborate and learned note upon the subject, in which he adopts

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[18] White *v.* Great Western Railway, 29 Law Times, 93.

[1] Farmers & Mechanics' Bank *v.* Champlain Transportation Co. 23 Vt. R. 186–206, adopts the following language upon this subject: "But we regard it as well settled, that the carrier may, by general notice, brought home to the owner of the things delivered for carriage, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility dependent upon certain conditions, as having notice of the kind and quantity of the things deposited for carriage, and a certain reasonable rate of premium for the insurance paid, beyond the mere expense of carriage."

[2] 2 Greenl. Ev. § 215, where the author seems to put forth substantially the same view. "It is now well settled that a common carrier may *qualify his liability*, by a *general notice* to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be responsible for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly. But the right of a common carrier, by a general notice to *limit*, *restrict*, or *avoid the liability* devolved upon him by the common law on the most salutary grounds of public policy, has been denied in several of the American courts, after the most elaborate consideration."

[3] Angell on Carriers, § 245.

fully the distinction, and arrives at the same conclusion here suggested.[4]

2. But the English cases do not seem to have brought out this distinction so clearly, as the American writers upon this subject. It seems to be supposed, by many of the English judges, and some of the late English cases seem to go that length, under their late statutes, (which we have referred to, § 133, and 140,) that there is no positive objection to recognizing the right of a common carrier, to stipulate for exemption from all liability, even for gross neglect, or positive misfeasance.[5]

SECTION XII.

RESPONSIBILITY FOR CARRIAGE BEYOND COMPANY'S ROAD.

1. *English rule to hold first company liable to the end of the route.*
2. *This rule not followed in the American courts.*
3. *But company may undertake for whole route.*
4. *This is presumed when they are connected in business.*
5. *Case of refusal to pay charges demanded and return of goods before reasonable time.*

§ 135. 1. The disposition of the English courts, since the establishment of railways, has seemed to be to regard parties who receive goods, and book them for a certain destination, as carriers * throughout the entire route.[1] Since the first case which

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[4] 1 Parsons on Contracts, 711, n. (*h.*)

[5] Maving *v.* Todd, 1 Starkie, 72. This was a case where the goods, while upon the premises and in the care of the carrier, had been destroyed by an accidental fire. It appearing that the carrier had so limited his responsibility that it did not extend to loss by fire. *Holroyd* submitted whether defendants could exclude their responsibility altogether. This was going further than had been done in the case of carriers who had only limited their responsibility to a certain amount. Lord *Ellenborough*, Ch. J.: "Since they can limit it to a particular sum, I think they may exclude it altogether, and that they may say we will have nothing to do with fire." Leeson *v.* Holt, 1 Starkie, 186, is similar. This was where the carrier had given notice that the species of goods for which the suit was brought, would be "entirely at the risk of the owners, as to damage, breakage," &c. Lord *Ellenborough*, Ch. J., said, in summing up to the jury, "In the present case they (the carriers) seem to have excluded all responsibility whatsoever, so that, under the terms of the present notice, if a servant of the carrier had, in the most wilful and wanton manner, destroyed the furniture intrusted to him, the principal would not have been liable."

[1] Hodges on Railways, 615.

assumed this position,[2] there has not been manifested any disposition to recede from it.[3] And the English courts have extended the same rule to carriers in England, in the direction of Scotland where the goods are received and booked for points beyond the limits of England.[4]

2. But this rule has been very seriously questioned in this country. The general view of the American courts upon this subject, is, that in the absence of special contract, the rule laid down in the earlier English cases,[5] that the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier, is the more just and reasonable one, and this is the doctrine which seems likely to prevail in this country, although there is no doubt some argument to be drawn from convenience in favor of the English rule.[6]

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2 Muschamp *v.* Lancaster & Preston Railway Co. 8 M. & W. 421.

3 Watson *v.* Ambergate, Not. & Boston Railway, 3 Eng. L. & Eq. R. 497; Scotthorn *v.* South Staffordshire Railway, 18 Eng. L. & Eq. R. 553; Wilson *v.* York, N. & B. Railway, 18 Eng. L. & Eq. R. 557.

4 Crouch *v.* London & N. W. Railway, 25 Eng. L. & Eq. R. 287.

5 Garside *v.* Trent & Mersey Navigation Co. 4 T. R. 581.

6 Farmers & Mechanics' Bank *v.* Ch. Transportation Co. 16 Vt. R. 52; 18 Vt. R. 131; 23 Vt. R. 186; Van Santvoord *v.* St. John, 6 Hill (N. Y.) R. 158; Hood *v.* New York & N. H. Railway, 22 Conn. R. 1; s. c. 22 Conn. R. 502; Nuttting *v.* Conn. R. Railway, 1 Gray, R. 502; Jenneson *v.* Camden & Amb. Railway, Dist. Court Phil. 4 vol. Am. Law Reg. 234. *Stroud*, J., in this last case, reviews all the cases upon the subject, and concludes, that in this country the courts have held, that when goods are delivered to a carrier marked for a particular place, but unaccompanied by any other directions for their transportation and delivery, except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them, according to the established usage of the business in which he is engaged, whether that usage were known to the other party or not.

The learned judge, in delivering his opinion, said: "The only question is whether this receipt contained an undertaking by the defendants to carry the chest beyond the terminus of their line, or, rather, beyond the place named in the receipt, the 'office of the defendants, in New York.'

"The language of the receipt is plain and positive—'which we promise to deliver at our office in New York, upon payment of freight therefor at the rate of 26 1-4 cents per 100 lbs.' For what purpose the memorandum, 'to be shipped for Camden, Ohio, from New York,' was made, we are not called upon to determine. We do determine that it did not enlarge the defendant's promise, as set forth in the body of the instrument; that it does not import an agreement by the defendants, that they would transport the chest to Camden, Ohio, and then deliver it to the plaintiff, which is the allegation in the declaration. It was ad-

*3. There are many cases, where the American courts have held the carrier liable beyond the limits of his own route, upon

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mitted by the plaintiff's counsel that the chest was safely carried to New York, that it had been put in the way of transportation to its destination, by delivery to a proper railway transportation company for that purpose, but what became of it afterwards could not be ascertained.

"Questions very similar to that which has here arisen, have occurred several times in England, and in some of our sister states. Muschamp *v.* The Lancaster & Preston Junction Railway Company, 8 Mees. & Wels. 421, was the case of a parcel delivered at Lancaster, addressed to a place in Derbyshire, beyond the line of the Lancaster and Preston Railway. Baron *Rolfe*, before whom the cause was tried, told the jury, that a carrier who takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, undertakes *primâ facie* to carry the parcel to its destination, and that the rule was not varied by the fact that that place was beyond the limits within which the carrier professed to carry. This ruling was sanctioned by the court in *banc.*

"In a subsequent case, Watson *v.* The Ambergate, Nottingham & Boston Railway Company, 3 Eng. Law and Eq. R. 497, the decision in Muschamp *v.* The Lancaster, &c. was approved.

"In this country, the courts have held, that when goods are delivered to a carrier, marked for a particular place, but unaccompanied by any other directions for their transportation and delivery except such as might be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether that usage were known to the party from whom they were received or not. Van Santvoord *v.* St. John, 6 Hill (N. Y.) R. 157; Farmers and Mechanics' Bank *v.* Champlain Transportation Co. 18 Vt. R. 140, and 23 ib. 209.

"In Nutting *v.* Connecticut River Railroad Co. 1 Gray, 502, a receipt was given of this description: 'Northampton, Mass. received of E. Nutting, for transportation to New York, nine boxes planes, marked,' &c. Two of these boxes were lost between Springfield, Mass. and New Haven, Conn., being beyond the terminus of the defendants' road. No connection in business was shown to exist between the defendants and the proprietors of the connecting road, nor was pay taken for the transportation beyond Springfield, which was the terminus of the defendants' road.

"The Supreme Court of Massachusetts held, that the true construction of this contract was, that the goods should be safely carried to the terminus of the defendants' road, and there delivered to the carriers on the connecting road, to be forwarded to their proper destination. This decision was made upon a case stated. Muschamp *v.* Lancaster & Preston Junction Railway, 8 M. & W. 421, was cited on behalf of the plaintiff, but the court disapproved of that decision, and held that, to bind a company under the circumstances of this case, the burden was upon the plaintiff to show a special contract by the company to carry the goods beyond the terminus of its own railway. There is another case which

the *ground of a special undertaking, either express, or implied, but whether any such contract exists is regarded as a matter to be determined, from all the facts and attending circumstances of the case, and will more generally be an inference for the jury, than the court, unless it depends upon the effect of written stipulations, and even then will often be affected, more or less, by attending facts and circumstances.[7]

4. The American cases upon the subject, with rare exceptions, recognize the right of a railway company to enter into special contracts to carry goods beyond the line of their own road. And where different roads are united, in one continuous route, such an undertaking, in regard to merchandise, received and booked for any point upon the line of the connected companies, is almost

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was cited on the argument before us, by the counsel of the defendant. In this it was decided by a divided court, that, where a passenger paid the fare to a point several miles beyond the terminus of the defendants' railroad, receiving from the conductor of the cars a ticket in this form: 'New Haven and Northampton Company—Conductor's Ticket—New Haven to Collinsville by stage from Farmington,'—that the company was not responsible for any injury sustained by the passenger on the stage road between Farmington and Collinsville. The case was tried twice. A new trial was granted after the first trial, on a ground corresponding with that taken in Nutting *v.* The Connecticut River Railroad Company, 1 Gray, 502; but, after the second trial, in which the verdict was, as it had been on the first, for the plaintiff, the court, in setting aside the second verdict, rested its opinion on the ground that the conductor had no authority to bind the company to carry beyond the limits of its railway, because the company itself could not make any such binding contract. Hood *v.* N. Y. & N. H. Railroad Co. 22 Conn. R. 1, 502.

"The case before us does not require, in support of the conclusion to which we have come, the adoption of the rulings in any of the cases in our sister states, which have been referred to. The nonsuit on the trial was placed distinctly upon the principle that the evidence did not support the declaration; that the *allegata* and *probata* did not agree. The declaration alleged that the goods were to be carried from Burlington, New Jersey, to Camden, Ohio; whereas the receipt was express, that they were to be delivered at the company's office at New York, and the charge of freight was to New York only, and not beyond."

7 Weed *v.* Sar. & Sch. Railway, 19 Wend. 534; Bennett *v.* Filyaw, 1 Flor. R. 403. The Laurens railway company gave receipts for cotton "to be delivered on presentation of this receipt at Charleston." The cotton reached the terminus of the Laurens railway in safety, and, there, without bulk being broken, was delivered in the same cars to the Greenville & Columbia railway to be carried on. It was afterwards lost. Held, that the Laurens railway company were liable—their undertaking being special to carry to Charleston. Kyle *v.* Laurens Railway, 10 Rich. (S. C.) R. 382.

matter of course. It is, we think, the more general understanding, upon the subject, among business men and railways, their agents and servants.[8] And this is so, although the connection among *such roads is only temporary, and merely incidental, for the convenience of transacting business, one road acting sometimes as agent for other roads, by their procurement or adoption.[9]

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[8] Noyes *v.* Rut. & Bur. Railway, 27 Vt. R. 110; Wilcox *v.* Parmelee, 3 Sand. 610; Ackley *v.* Kellogg, 8 Cowen, 223. Note of Editors to Am. Law Reg. 4 vol. 238, *et seq.* where this subject is very elaborately and very satisfactorily discussed. See Bradford *v.* S. C. Railway, 7 Rich. 201; Ma. Mutual Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Mallory *v.* Bennett, id. 234.

In a late English case, Collins *v.* The Bristol and Exeter Railway, 36 Eng. L. & Eq. R. 482, a carrier of goods had intrusted them to the Great Western Railway, to be carried from Bath to Torquay. To accomplish the transit, the goods must pass over three railways, the defendants' company being one, and the goods were burned upon their line. The receipt-note, or bill of lading, given by the Great Western Company, specified, that the company were not to be answerable for loss by fire. The carriage was paid, for the whole distance, to the Great Western Company.

The defendants entered into a rule, at the trial, to take no advantage of the action not being brought against the Great Western Company.

Alderson, B., said, "We think the contract for the conveyance of the van of furniture was one contract, and that it was made with the Great Western Company alone. They contracted, in express terms, upon the face of the receipt-note, to carry the goods from Bath to Torquay. We think, therefore, there was a contract by the Great Western Company, to carry the goods the whole way to Torquay, and, of course, the condition as to fire extends to, and protects from such loss, during the entire journey. And this is in exact conformity with the judgment of this court, in Muschamp *v.* The Lancaster & Preston Junction Railway Company, which has been frequently confirmed and acted upon in all the courts of Westminster Hall. We, therefore, think that no action is maintainable against any of the companies, and a nonsuit ought to be entered." But this case is reversed in the Exchequer Chamber, November, 1856, and notice of appeal to the House of Lords, given 28 Law Times, 260; s. c. 38 Eng. L. & Eq. 593.

[9] Wibert *v.* New York & Erie Railway, 2 Kernan, 245, 255. In this case, *Hand*, J., said, "There has been some question how far one railroad can be sued for the negligence of another, where the transportation is continuous and entire over their respective roads. See Weed *v.* Saratoga & Sch. Railway, 19 Wend. 534; St. John *v.* Van Santvoord, 25 id. 660; s. c. 6 Hill, 157; Muschamp *v.* Lancaster Railway, 8 M. & W. 421; Croueh *v.* London & N. W. Railway Co. 14 C. B. 255; 1 Parsons on Cont. 686–7, and notes; Champion *v.* Bostwick, 18 Wend. 175; Fromont *v.* Coupland, 2 Bing. 170; Russell *v.* Austwick, 1 Sim. R. 52. In some of the cases above cited, the corporation, to whom the property was first delivered, was held liable for the default of other corporations, over whose lines the property was or should have been carried, and where a carrier is in the

And if *it be the usual course of the carrier's business to forward goods beyond his route by sailing vessels, he is not liable,

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habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them has been presumed, but where their operations are entirely disconnected there is no partnership. 6 Hill, 157. But in many cases in which different railroad corporations cannot be considered by the public strictly as partners, they may and often do act as agents of each other."

In 23 Vt. R. 209, it was said, "There has been an attempt to push one department of the law of carriers into any absurd extreme, as it seems to us, by a misapplication of this rule of the carrier being bound to make a personal delivery. That is, by holding the first carrier upon a route consisting of a succession of carriers, liable for the safe delivery of all articles at their ultimate destination. Muschamp *v.* The L. & P. Railway Co. 8 M. & W. 421, is the only English case much relied upon in favor of any such proposition, and that case is, by the court, put upon the ground of the particular contract in the case; and also that "All convenience is in favor of such a rule," and "there is no authority against it," as said by Baron *Rolfe*, in giving judgment. St. John *v.* Van Santvoord, 25 Wend. 660, assumed similar ground.

But this court, in this same case, (16 Vt. 52,) did not consider that decision as sound law or good sense; and it has since been reversed in the Court of Errors, Van Santvoord *v.* St. John, 6 Hill, 158, and this last decision is expressly recognized by this court. 18 Vt. 131. Weed *v.* Saratoga & S. Railway Co. 19 Wend. 534, is considered by many as having adopted the same view of the subject. But that case is readily reconciled with the general rule upon the subject, that each carrier is only bound to the end of his own route, and for a delivery to the next carrier, by the consideration that in this case there was a kind of partnership connection between the first company and the other companies, constituting the entire route; and also that the first carriers took pay and gave a ticket through, which is most relied upon by the court. But see opinion of *Walworth*, Ch., in Van Santvoord *v.* St. John, 6 Hill, 158. And in such cases, where the first company gives a ticket and takes pay through, it may be fairly considered equivalent to an undertaking to be responsible throughout the entire route. The case of Bennett *v.* Filyaw, 1 Florida, 403, is referred to in Angell on Carriers, § 95, n. 1, as favoring this view of the subject.

The rule laid down in Garside *v.* Tr. & M. Nav. Co. 4 T. R. 581, that each carrier, in the absence of special contract, is only liable for the extent of his own route, and the safe storage and delivery to the next carrier, is undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject. Ackley *v.* Kellogg, 8 Cow. 223. This is the case of goods carried by water from New York to Troy, to be put on board a canal boat at that place, and forwarded to the north, and the goods were lost by the upsetting of the canal boat, and the defendants were held not liable for the loss beyond their own route. The cases all seem to regard this as the general rule upon the subject, with the exception of those above referred to; one of which (8 M. & W. 421) considers it chiefly a matter of fact, to be determined by the jury as to the extent of the undertaking; one (25 Wend. 660) has been disregarded by this court, and

for not forwarding a particular article by steam-vessel, unless the direction to do so be clear and unambiguous.[10]

5. In a very late case in the Court of Exchequer,[11] the plaintiff sent a parcel by defendants, to "Reynolds', Plymouth," who took it to the end of their route, and then passed it on by another railway, as their agents, to the house of Reynolds, and demanded 2*s.* 3*d.* for its carriage. Payment of this sum was refused, and 1*s.* 6*d.* only offered. On the morning of the next day the parcel

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reversed by their own Court of Errors, (6 Hill, 158); one (19 Wend. 534) is the case of ticketing through upon connected lines; and one (1 Florida, 403) I have not seen." See also Nutting *v.* Conn. River Railway, 1 Gray, 502, and Elmore *v.* Naugatuck Railway, 23 Conn. R. 457. One company chartering one of their boats to another company for a single trip, but retaining the charge of it and of navigating it, were held liable to a passenger for the loss of his baggage. Campbell *v.* Perkins, 4 Selden, 430. In Foy *v.* Troy & Boston Railw. 24 Barb. 382, it was held, that where goods were received by defendants at Troy, consigned to a person at Burlington, Vermont, it will be understood, in the absence of any proof to the contrary, as an undertaking to deliver the goods in the same condition as when received at the place of destination. And it is said in this case, that where property is so consigned, and is to pass over more than one road, that it is not the duty of the owner, in case of injury to his goods, to inquire how many different companies make up the line between the place of shipment and the place of delivery, or to determine, at his peril, which company was liable for the injury. It is also said here, that if the company receiving freight for transportation desires to limit its responsibility to injuries occurring upon its own road, it should provide for such limitation in its contract. In a late English case, Willey *v.* The West Cornwall Railway, 30 Law Times, 261, the same propositions are maintained, as in the case last cited, with the exception of the one last ruled, which did not arise. It is also said here, that the company are as much bound by a contract to carry beyond their own route, where the transportation is partly by water, as if it were all by rail, and that the company cannot defend upon the ground that a contract to carry beyond their own route is *ultra vises*.

[10] Simkins *v.* Norwich and New London Steamboat Co. 11 Cush. R. 102.

[11] Crouch *v.* Great Western Railway, 29 Law Times, 354. It is here held, that if a carrier contracts to carry goods to, and deliver them at a particular place, his duty at that place is precisely the same, whether his own conveyance goes the entire way, or stops short, at an intermediate place, and the goods are conveyed by another carrier; and the carrier, or his clerk, at the place of destination, is the agent of the original carrier for all purposes connected with the conveyance, and delivery and dealing with the goods as his own clerk would have been at the place where his own conveyance stops.

Bramwell, B., who dissented from the decision in this case, says, in regard to the case of Scotthorn *v.* South Staffordshire Railway, 8 Exch. 341, *supra*, *post*, § 137, "I reserve to myself the right to question its correctness on a fitting occasion."

was returned to London, and on that day the consignee sent to pay the 2*s.* 3*d.* under protest, and obtain the parcel. He then made search for it in London and elsewhere, but it could not be found, and he brought this action for a conversion. The jury found a tender of the 2*s.* 3*d.* and a demand of the parcel, in a reasonable time, and that the parcel was returned to London before a reasonable time, and a consequent conversion. It was held that the facts justified the finding.

SECTION XIII.

POWER OF COMPANY TO CONTRACT TO CARRY BEYOND ITS OWN LIMITS.

1. *No doubt existed in regard to this power until very recently.*
2. *Receiving freight across other lines and giving ticket through.*
3, 4, and 5. *Cases reviewed upon this point.*

§ 136. 1. It was for many years regarded as perfectly settled law, that a common carrier which was a corporation chartered for purposes of transportation of goods and passengers between certain points, might enter into a valid contract to carry goods delivered to them for that purpose, beyond their own limits.[1] Most of the American cases do not regard the accepting a parcel, marked for a destination beyond the terminus of the route of the first carrier, as *primâ facie* evidence of an undertaking to carry * through to that point. But the English cases do so construe the implied duty resulting from the receipt.[2]

2. But the cases, until a very recent one,[3] do hold, that a rail-

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[1] *Ante*, § 135, and cases there cited; Moore *v.* Michigan Central Railway, 3 Mich. R. 23.

[2] *Ante*, § 135, and notes. Fairchild *v.* Slocum, 19 Wend. 329.

[3] Hood *v.* New York and New H. Railway, 22 Conn. R. 502. See Elmore *v.* Naugatuck Railway, 23 Conn. R. 457. And in Naugatuck Railway *v.* Waterbury Button Co. 24 Conn. R. 468, it was held that a provision in the plaintiff's charter authorizing them to "make any lawful contract with any other railroad corporation, in relation to the business of such road," only extended to contracts for the common use of such other roads, as lay within the limits of plaintiffs' charter, and that it did not enable the company to enter into a contract to carry freight to the city of New York, either upon other railways or steamboats, and that such contract could not be inferred from the course of plaintiffs' business, and that having carried the goods to the end of their route and delivered them to the next carrier in the line of their destination, they were no further liable.

way company may assume to carry goods to any point to which their general business extends, whether within or without the particular state, or country of their locality.[4] And it has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular railway, and accepting the carriage through, and giving a ticket or check through, does import an undertaking to carry through, and that this contract is binding upon the company.

3. The case of Hood *v.* The New York and New H. Railway, assumes the distinct proposition that the conductor could not bind the company by such contract, because the company had no power to assume any such obligation. The case is not attempted to be maintained upon the basis of authority, but upon first principles, showing therefrom, the innate want of authority in the company. It must be admitted the reasoning is specious; so plausible indeed that if the matter were altogether *res integra*, it might be deemed sound.

4. But it must be remembered that in the construction of all legislative grants, many things have to be taken, by implication, as accessory to the principal thing granted. And if we are not allowed to assume such indispensable incidents, as are necessary to the exercise of the powers conferred, in such a manner, as to accomplish the main purpose, in a reasonable and practicable mode, we shall necessarily be led into inextricable embarrassments. Hence we conclude this case may have assumed possibly too narrow grounds, and such as might render the principal grant of the *company to become common carriers of freight and passengers, from New York to New Haven, less useful to the public, consistently with the security of the company, than the circumstances required. The strict and undeviating requirement in all cases, that all railways shall be restricted in their contracts for transporting persons, parcels, baggage, and goods, to the line of their own road, and a safe delivery to the next carrier, and that nothing like copartnership in the business of a particular route, consisting of different companies, could exist, would certainly be throwing serious hinderances in the way of business, without any adequate advantage.[4]

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[4] *Ante*, § 135, and notes.

5. And it was held in a recent case by the Supreme Court of Vermont, that railway companies, as common carriers, might make valid contracts to receive freight at, or to convey it to points, beyond the limits of their own road, and thus become liable for the acts or neglects of other carriers, not under their control; and that in regard to matters not altogether beyond the general objects of their incorporation, and which, upon a liberal construction, might fairly be considered as embraced within them, it was not competent for the company to adopt the acts of their agents and officers so long as they proved beneficial, and when they proved otherwise, shield themselves from responsibility, by resorting to a more limited and literal construction of their corporate powers.[5]

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[5] Noyes *v.* The Rut. & Bur. Railway, 27 Vt. R. 110. The grounds of the decision are thus stated: "It seems to be now well settled that railway companies, as common carriers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers, in no sense under their control. Muschamp *v.* L. & P. Junction Railway Co. 8 M. & W. 421; Weed *v.* Saratoga & Schenectady Railway Co. 19 Wend. 534; Farmers & Mechanics' Bank *v.* Champ. Trans. Co. 23 Vt. 186.

"It has never been questioned that carriers, whether natural or artificial persons, might by usage or contract bind themselves to deliver parcels and merchandise beyond the strict limits of their line, in town and country; and in such case could only exonerate themselves by a personal delivery. 23 Vt. 186, and cases there cited.

"It seems to us, in principle, that these two propositions control the present case; for if a railway company may contract for carrying merchandise and parcels beyond the limits of their line, where the carriage is by porters, stages, by steamboats or other water-craft, or by other railways, and this is to be justified upon the ground of usage and convenience, or common understanding and consent, the same rule of construction must equally extend to contracts to receive freight at points on the line before it reaches the company entering into the contract. It may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of the words of their charter. But the time is now past, when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to. It is true that such corporations, even as to strangers, are not allowed to assume obligations altogether beyond the general objects of their incorporation, as if they should assume to build steamboats, or other railways, perhaps. But within the general business of their creation, a very considerable latitude is allowed in contracts with strangers. This is done for the advantage of the company, as well as others, and to avoid embarrassments in the common business of life, which must be constantly liable to occur upon any such limited construction of the powers of

*SECTION XIV.

AUTHORITY OF THE AGENTS AND SERVANTS OF THE COMPANY.

1. *Board of directors have same power as company, unless restricted.*
2. *Other agents and servants cannot bind the company beyond their sphere.*
3. *Owner may countermand destination of goods, through proper agent.*
4. *But an agent who assumes to bind the company beyond his sphere, cannot.*
5. *Ratification of former similar contracts, evidence against company.*
6. *Notice by company of want of authority in servants, if known, will excuse them.*
7. *Illustrations of the rule.*
8. *Servant may bind company, even when he disobeys their directions.*
9. *Company responsible for the servants of other companies.*

§ 137. 1. As the entire business of railways is of necessity transacted through the instrumentality of agents, the extent of their authority becomes a serious and important inquiry, as well for the stockholders as the public. As a general rule it may be safely affirmed that the board of directors have all the power which resides in the corporation, subject to such restrictions only, *as are imposed upon them by the charter and by-laws of the corporation.

2. The other agents of the company are confined to their several spheres of operation. Thus station agents, who receive and forward freight, have power to bind the company, by a contract, that the goods shall be forwarded to a point, beyond the terminus of the company's road, (on the line of another railway,) before a particular hour, and this it would seem, notwithstanding

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corporations, as is contended for by the plaintiffs below. These corporations are now held liable for a nuisance, in obstructing highways;—for damages, in consequence of a departure from the ordinary and safe mode of constructing their embankments, although attempted in that form to aid a manufacturing interest, by making the embankment serve the double purpose of a dam and embankment for the track of the road; *Ante*, § 125, note 1;—and in many other cases, where, if the stockholders had interfered, in the first instance, the agents of the company would have been restrained from doing the acts in the name of the company. But if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of its charter, upon the most literal interpretation, and strangers are thereby induced to contract, upon the faith of the authority of the agents of such companies, the companies are not at liberty to repudiate the authority of such agents, when their transactions prove disastrous." And the principle of this case is maintained in Hart *v.* Rensselaer & Sar. R. 4 Selden, 37; Schroeder *v.* Hudson River R. 5 Duer, 55.

a general notice has been published, that the company would not be responsible for forwarding goods beyond the terminus of their own road.[1] So, too, it has been held to be a proper question to submit to the jury, under proper instructions, whether a particular servant, or officer, had not, under the circumstances, authority to bind the company.[2]

3. So, too, it would seem, that any one having put goods, or baggage, upon the company's trains, or into their custody, is at liberty, at any time, to alter its destination, or resume his custody of it, unless indeed it had been packed with other merchandise where it could not be removed, without unreasonable expense; and the station agent, who receives the goods, or baggage, is competent to bind the company, by receiving a countermand, or new directions, to which he assents,[3] as being in the line of his employment. His assent and promise to execute the order, may be regarded as evidence tending to show that the order was given to the proper person.

4. But where an agent of a railway company assumes to make a contract, in relation to the business of the company beyond the line of his ordinary employment, and especially where it is

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[1] Wilson *v.* York, Newcastle & Berwick Railway, 18 Eng. L. & Eq. R. 547, in note. This was a case at Nisi Prius, before *Jervis*, Ch. J. The refusal of the station master, or of any one, to whom he should refer the party, to deliver goods in his custody, at the station, will bind the company, and if done without proper excuse, will render them liable in trover. Rooke *v.* Midland Railway, 14 Eng. L. & Eq. R. 175.

[2] Scotthorn *v.* South Staffordshire Railway, 18 Eng. L. & Eq. R. 553; Schroeder *v.* Hudson River R. 5 Duer, 55.

[3] Same case, where *Martin*, B., said: "A carrier is employed, as bailee of another's goods, to obey his directions concerning them; and I have no hesitation in saying, that generally, at any period of the transit, he may have them back. I think that if a traveller by railway is dissatisfied with his mode of travelling, he may at any point stop and require that his luggage should be delivered up to him. The station clerk had power to receive the countermand; and a loss having ensued from an omission to comply with that countermand, the defendants are bound to make that loss good."

So also where goods, carried by one company, arrive at the station of another company, the place of their destination, but that company refuse to deliver them to the owner, he offering to pay all charges, on the ground that their contract with the other company, to deliver goods for them, does not include this class, being timber, and that they shall therefore require the goods to be taken back upon the line of the other company, it was held to be a conversion. Rooke *v.* Midland Railway, 14 Eng. L. & Eq. R. 175.

in contravention of the common course of the business of the company, or of their published rules and regulations, it will not bind the *company.[4] Thus it was held that a surgeon, who amputated the limb of a passenger, who was injured by the moving of a truck upon the railway, and the station agent had directed, that "every attention" should be paid to such person, in consequence of which the surgeon performed the operation, could not recover of the company for his services, on the ground, that it was not incident to the employment of such agent, to bind the company by such contract.[5]

5. But the fact that the company had ratified similar contracts made, by this same agent, might be evidence tending to show, that they had given this particular servant authority to make such, or similar contracts, but not, that they had given authority to all their servants to do so.[5]

6. If the company give notice that they will not be bound by the delivery of goods, "unless they were signed for by their clerks or agents," and this is known to the plaintiff, the company are not bound by a delivery in a different mode.[6]

7. But where trees were carried upon the company's trains, and *the owner obtained leave to set them temporarily in the company's grounds, by permission of the station clerk, or of the general superintendent of the company, and both these persons subsequently refused to let the owner take them away, where-

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[4] Elkins *v.* Boston & Maine Railway, 3 Foster, 276. In this case the ticket-master and station agent of defendants received some parcels of goods of the plaintiff, and promised to forward them by the next passenger train, and the goods were lost. The plaintiff proved that in two instances, in the two years preceding, goods had been forwarded, by the passenger trains, under the charge of some of defendant's servants, but it did not appear, that freight was paid the company, or that they in any other way assented to it. See also Norwich & Worcester Railway *v.* Cahill, 18 Conn. R. 484, where it is held the declaration of a director is good evidence of contract to bind the company. But testimony of this character is of almost infinite variety, in regard to its force and effect, and much of it, as in the case first cited in this note, is too remote to be much ground of reliance. To bind the company, the testimony should show a usage or continuous practice.

[5] Cox *v.* Midland Counties Railway, 3 Exch. 268; Stephenson *v.* N. Y. & Harlem Railway, 2 Duer, 341.

[6] Slim *v.* Great N. Railway, 26 Eng. L. & Eq. R. 297. The authority of the agent to bind the carrier, is always a question of fact dependent upon the attending circumstances and the course of business. Thomson *v.* Wells, 18 Barb. 500.

upon he applied to the managing director of the company, who also refused, and he brought trover against the company, the court of Exchequer Chamber held it would lie.[7] But where the servant of the company arrests a passenger for not paying fare, the company are not liable.[8]

8. And it makes no difference in regard to binding the company that the agent disobeyed the direction of his superior, if he was acting within the scope of his employment at the time.[9]

9. And in the case of a common carrier of goods, he is liable for the act of all the servants of his sub-contractor.[10]

SECTION XV.

LIMITATION OF DUTY, BY COURSE OF BUSINESS.

1. *Carriers bound only to the extent of their usage, and course of business.*
2. *This question arises only, when they refuse to carry.*
3. *Carriers and some others are bound to serve all who apply.*
4. *Duty under English Carriers' Act.*

§ 138. 1. It seems to be an admitted principle in the law of carriers, that their obligations and duties may be restricted by the course of their business. They may limit it to the carrying of particular commodities. The business of common carriers is not one imposed upon any particular person, natural or artificial, and any * one may undertake it, at will, and by consequence may enter upon so much of the entire business, as he chooses.[1]

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7 Taff Vale Railway *v.* Giles, 22 Eng. L. & Eq. R. 202. The court say, "it is the duty of the company to have some person clothed with discretion, to meet any exigency that may arise, and to grant any reasonable demand."

8 Eastern Counties Railway *v.* Broom, 6 Railw. C. 743; Roe *v.* Birkenhead Railway, 6 Railw. C. 795.

9 Philadelphia & R. Railway *v.* Derby, 14 How. 468, 483. Nor will it excuse the company from liability because the disregard of duty on the part of the agent, was wilful. Weed *v.* Panama Railw. 5 Duer, 193.

10 Machu *v.* The London & Southwestern Railway, 2 Exch. R. 415; s. c. 5 Railw. C. 302. This case was where the company employed an agent to deliver parcels in London. They had been accustomed to send a delivery ticket with each parcel, which was headed with the name of the company, and signed by the party employed by them to make the delivery, and contained the names of the porters of that party; one of which porters stole the parcel in this case. Held, that such porter is to be regarded as the company's servant, within the Carriers' Act.

1 Farmers & Mechanics' Bank *v.* Champlain Transportation Co. 23 Vt. R. 186.

2. But this distinction is of no practical importance, except where carriers refuse to carry certain kinds of goods, or to carry them, except upon certain conditions excusing their general common law responsibility, and suit is brought for the refusal. In such cases it is believed the carrier is not liable for an absolute refusal to carry goods, wholly out of the range of his ordinary business, unless where the carrier is a corporation chartered, with the powers and for the purpose, of becoming common carriers in general, and in such cases even, it seems the better opinion, that unless restrained by the express terms of their charter, such companies have the same liberty, as to the extent of their business, as natural persons.[2] In this last case the language of *Parke*, B., is pertinent. "The question is whether the defendants are, under the circumstances of this case, bound to carry coals from Milton to Oakham. If they are merely in the situation of carriers, at common law, they are not bound, for they have never professed to carry coals from, or to, those places. At common law a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession." He then cites at length the words of *Holt*, Ch. J., in Lane *v.* Cotton, 12 Mod. 484, in regard to the general duty of all, who undertake to serve the public in any particular business, to serve all who come, citing the cases of blacksmiths,[3] innkeepers,[4] and common carriers.

Opinion of *Daniel*, J., in New J. Steam Navigation Co. *v.* Merchants Bank, 6 How. R. 344. If any illustration or authority were needful upon this point, it might very readily occur to any one, reflecting upon the subject. An express company are no doubt liable, as common carriers, but are not compellable to carry such articles as are never expected to be sent, or carried, by express, as for instance articles of great bulk and weight. It would certainly be a novelty to require an express company to transport coal, salt, iron, and lead in pigs, &c.

But practically the increased price of this mode of transportation will protect them, from these extraordinary demands, and they have the right also to demand the protection of the law as well as other persons from liability to such intrusion.

[2] Johnson *v.* Midland Railway, 4 Exch. R. 367; 6 Railw. C. 61; Sewall *v.* Allen, 6 Wend. 335; Citizens Bank *v.* Nantucket Steamboat Co. 2 Story, 16.

[3] Keilway, 50, pl. 4, cited in note to Lane *v.* Cotton, 12 Mod. R. 484, and in note to Parsons *v.* Gingell, 4 C. B. 555.

[4] Dyer, 158, Godb. 346. But it seems to be conceded by the learned baron here, that the instance, which he cites of the smith being bound to shoe all the horses of the realm which come to him, is at least rendered questionable, by the note to Parsons *v.* Gingell, 4 C. B. 545. And this liability to action for refusal to

*3. In the case of an innkeeper, there is no question, that the action will lie. So also in the case of a carrier, and that arises from the public profession which he has made. A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another; as from Manchester to London, and then he would not be bound to carry to, or from, the intermediate places.

4. In regard to the effect of the act of parliament, the learned judge says: "I think, that no obligation is cast upon the company, to undertake the duties of carriers altogether, and on every part of their line, but that they may carry some goods on one part of the line, and not on others." That act in terms enabled that company to become carriers, but did not oblige them to do so. Hence it is said, "They are not bound to carry to or from each place on the line, or every description of goods."[5]

SECTION XVI.

STRANGERS BOUND BY COURSE OF BUSINESS AND USAGES OF TRADE.

1. *Those who employ railway companies, bound to know the manner of transacting their business.*
2. *General usages of trade presumed to be familiar to all.*
3. *Contracts for transportation contain, by implication, known usages of the business.*

§ 139. 1. Questions of some difficulty often arise in regard to the effect of usage in the carrying business. If it is understood, as applicable to railways, as synonymous with the general course of transacting the business of carriers, by railway companies,

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serve another, in one's business, undoubtedly, is confined to carriers of goods and passengers, and innkeepers, in regard to which, the learned judge insists, there never was any question. Lane *v.* Cotton, 12 Mod. 472, 484.

[5] It is said there must be either a special contract, or a general usage, to carry the particular kind of goods, to render the party liable for not carrying. Tunnell *v.* Pettijohn, 2 Harr. 48; Bennett *v.* Dutton, 10 N. H. 481. But if the party undertake the carriage, although he had not been accustomed before to carry that kind of goods, he is liable, as a common carrier, if that is his general business, unless he make a special acceptance. See the cases cited above, and Powell *v.* Mills, 30 Miss. R. 231.

then *those who employ them are undoubtedly bound to take notice of it.[1]

2. The usages of any particular trade, such as are uniform, or general, are presumed to be familiar to all persons having transactions in that trade or business; and all parties making contracts, upon any subject, leave such incidents as are presumed to be familiar to both parties, and in regard to which there cannot ordinarily be any misunderstanding, to implication merely.

3. The same is eminently true of the carrying business, upon the great thoroughfares of the country. Contracts are made, by

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[1] St. John *v.* Van Santvoord, 25 Wend. 660; s. c. 6 Hill, 157. This case perhaps illustrates this subject about as well as any one. In the Supreme Court it was considered, that had the owners of the goods known that defendant was not a carrier beyond Albany, he would only have been bound to the end of his route; but as this was not known to the owners, and defendants gave a general receipt, describing the box by its marks, "J. Petrie, Little Falls, Herkimer Co." the plaintiffs were at liberty to infer, they were carriers to that point, and therefore they were responsible for its safe delivery, at its destination.

This decision was reversed in the Court of Errors, and Chancellor *Walworth*, delivering the leading opinion, said: "If the owner of the goods neglects to make the necessary inquiry, as to the usage and custom of the business, or to give directions as to the disposal of the goods, it is his own fault, and the loss, if any after the carrier has performed his duty, according to the ordinary course of his trade and business, should fall upon such owner, and not upon the common carrier."

The Chancellor argues further, that from the circumstances, the plaintiffs had no right to expect a personal delivery, by the defendant, and therefore the law did not require it. In the case of Gibson *v.* Culver, 17 Wend. 305, Justice *Cowen* seems to suppose, that the carrier, by stage-coach, is, in the first instance, bound to personal delivery, and that in order to exonerate himself from that obligation, he must show a custom or usage, of such notoriety, as to justify the jury in finding that it was known to the plaintiffs, in order to excuse the carriers.

But it should be noted, that this was as far as it was necessary to go in this case, in order to excuse the carrier, and it is therefore not certain how far the court might have gone here, if the facts had required it. For in 6 Hill, 158, this view is altogether repudiated, and the more rational one adopted, that if one is ignorant of the course of business on the route, he is bound to make inquiry, and cannot make a contract, with his eyes closed, and thereby impose a greater obligation upon the other party, in consequence of his own blindness.

See also the opinion of the court in F. & M. Bank *v.* Ch. T. Co. 23 Vt. R. 211, 212. In Cooper *v.* Berry, 21 Ga. R. 526, it is said that usage may be resorted to for the purpose of showing, that common carriers of certain goods are only subject to a modified responsibility, in regard to their preservation, it having been the uniform practice for the carriers to except, in their bills of lading, all losses by fire, and this being known to the owners, or their agents.

way of memorandum merely, and to a jury, who know nothing of the usages, and course of business, in such transactions, would be quite unintelligible, and could only be made to express the real purpose of the parties, in connection with such usages, and course of business, as is presumed to be in the minds of the parties, at the time of entering into the contract.

And if one of the parties assumes to transact such business, in ignorance of the very elementary usages of the business, he is not allowed to gain an unjust advantage of the other party, by means of his own voluntary, or rash ignorance, nor is the other party at liberty to take advantage of such ignorance and inexperience, * (when made known to him,) to induce such inexperienced one, to assume an unequal risk on his part.

But where the usage, or custom, is resorted to for the purpose of controlling the general principles and obligations of the law of contract, there is no doubt of the necessity of showing its notoriety, as well as its reasonableness and justice. The latter qualities are generally supposed to be sufficiently shown by the general acquiescence of the public, in the usage.

But where the complaint against the carrier is for not delivering cotton in good condition, a plea that it was the custom known to the plaintiff to transport cotton and other freight, between the points named in the bill of lading, in open boats, and that all the damage which the cotton sustained, was caused by the rains, which fell during the voyage, was held good on demurrer.[2]

SECTION XVII.

CASES WHERE THE CARRIER IS NOT LIABLE FOR GROSS NEGLIGENCE.

1. *Extent of English Carriers' Act.*
2. *Must give specification, and pay insurance.*
3. *Loss by felony of servants excepted. But not liable unless by carrier's fault.*
4. *Not liable in such case, where the consignor uses disguise in packing.*
5. *Carrier is entitled to have an explicit declaration of contents.*
6. *But refusal to declare contents will not excuse the carrier for refusal to carry.*
7. *This statute does not excuse carrier for delay in the delivery.*

§ 140. 1. Under the English Carriers' Act,[1] the carrier is not liable for the carriage of articles there enumerated, as "articles

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2 Chevallier *v.* Patton, 10 Texas, 344.

1 1 Wm. 4 & 11 Geo. 4, c. 68. Looking-glasses being specified in the act, it

of "great value in small compass," with certain specified ones, as "money, bills, notes, jewelry," &c., if the requisitions of the statute are not complied with, although the goods be lost through the gross negligence of the carrier, or his servants.[2]

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was held to extend to a "large looking-glass." Owens *v.* Burnett, 2 Car. & Marsh. 357. Some other curious inquiries have arisen under this act, in regard to its extent. Thus the word "trinkets," used in the act, was held not to comprehend an eye-glass with a gold chain attached. Davey *v.* Mason, 1 Car. & Marsh. 45. And also that "silks" does not include silk dresses, made up for wearing. Id. Hat bodies, made partly of wool, and partly of fur, are not "furs." Mayhew *v.* Nelson, 6 Car. & P. 58. So, too, a bill of exchange, accepted blank, and sent to the party for whose benefit it was accepted, and who was expected to sign it, as drawer, and which was lost before it reached its destination, is not a bill, or note, within the act.

[2] Hinton *v.* Dibbin, 2 Q. B. 646. Lord *Denman*, Ch. J., here said: "The question for our decision is, whether since the passing of the said act, a carrier is liable for the loss of goods, therein specified, by reason of gross negligence. . . . In putting an interpretation upon this statute, for the first time, we necessarily feel the case to be one of considerable importance, both because it is the first, and also because it regards a subject, upon which much doubt and uncertainty have existed, making it expedient, therefore, that the question should be finally settled. In deciding upon this statute, we must of course be regulated by its language; and the state of the law at the time of its passing is material only so far as it enables us to discover the mischief for which it was intended to apply a remedy. It is then enacted that no such common carrier shall be liable for the loss of or injury to any property therein specified (including silks,) above the value of £10, unless, at the time of the delivery thereof at the office, warehouse, or receiving-house of such carrier, or to his servant, for the purpose of being carried, the value and nature of such property shall have been declared, and such increased charge as thereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such property. By the first section, therefore, thus briefly abstracted, the exemption of the carrier from liability is absolute and complete, unless the preliminary thereby made indispensable, is complied with by the owner of the goods. The increased charge is, by the second section, declared to be what the carrier is entitled to receive over and above the ordinary rate of carriage for the conveyance of the species of property before enumerated, when above £10; such increased rate of charge to be notified by some notice to be affixed in some conspicuous part of the office, warehouse, or receiving-house where goods are received for carriage. By section 4, it is provided, that no public notice or declaration shall exempt any carrier from his liability at common law for the loss of or injury to any articles other than those in the first section enumerated, but that as to such other articles, his liability, as at common law, shall remain notwithstanding such notice. From which exception, as to the liability of the carrier in respect of goods not enumerated, it seems impliedly to follow that, as to those which are, protection is afforded to him in the manner above set forth. By section 8, it is enacted, that nothing in this act shall

*2. The act contains an exception of loss caused by the felony of the carrier's servants. The condition upon which, in all other cases, the carrier is to be made liable for carrying the articles enumerated, is, that at the time of the delivery of the articles, the owner, or his agent, make a declaration of the nature and value of the goods, and pay, or agree to pay, any increased rate of charge, which the general regulations of the carrier may require.

3. In regard to the liability of the carrier, for loss, by the felony of his servants, it was held, that when the carrier was not notified of the contents of the parcels, as, by the act, he was entitled to be, it was only the liability of an ordinary bailee for hire.[3] And the mere fact of loss, by the felony of a servant, is not *primâ facie* evidence of negligence in a bailee for hire.[4]

4. And where the carrier uses artifice, to disguise the valuable contents of the parcel, as where two hundred sovereigns were inclosed in six pounds of tea, and they were stolen by the carrier's servants, it was held the carrier was not liable, the owner having virtually contributed to his own loss.[5]

5. Under this act the carrier is entitled to have an express

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be deemed to protect such carrier from the felonious acts of any servant in his employ, nor to protect such servant from liability for any loss or injury by his own personal neglect or misconduct. The former branch of the clause is, to say no more, at least consistent with the supposition that for conduct short of felony the carrier is no longer liable; whereas it is obvious that, before the passing of the act, the carrier would have been liable for acts of the servant not amounting or approaching to felony—negligence. The latter branch seems to have been introduced *ex abundanti cautelâ* merely, seeing that there is nothing in any part of the act to vary the liability of the servant to the master for any misconduct of the former.

"Upon the whole, the language of the first section seems to us to be perfectly clear and unambiguous, without exception or restriction, and that none can fairly be implied from any other part of the act. By holding the carrier exempt from liability as to the enumerated articles, unless the owner shall declare their nature, and pay for them in the manner prescribed, we not only further the object avowed in the title and preamble of the act, but give it the effect of removing doubts and difficulties which, (as we have seen) it is admitted, did exist as to the liability of a carrier for the loss of goods, who has sought to limit that liability, by the publication of a notice in the usual form."

3 Butt *v.* Great Western Railway, 7 Eng. L. & Eq. R. 443.

4 Finucane *v.* Small, 1 Esp. 315. "To support an action of this nature, positive negligence must be proved," per Lord *Kenyon*, Ch. J.

5 Bradley *v.* Waterhouse, Moody & M. 154; s. c. 3 C. & P. 318.

declaration from the owner, or his agent, of the contents of a box, whenever it is delivered, however obvious to conjecture the nature of the contents may be.[6]

*6. But it seems that the refusal to declare the contents of a parcel, will not justify the carrier in refusing to carry it, but only excuses the loss.[7]

7. In a late case,[8] it was held, that the exemption of the carrier under this act had reference exclusively to a "loss," of the article "by the carrier," such as by the abstraction of a stranger, or by his own servants, not amounting to a felonious act, or by the carrier or his servants losing them from vehicles in the course of carriage; or by mislaying them, so that it was not known where to find them, when they ought to be delivered, and that it does not extend to any loss of any description whatever, occasioned to the owner of the article, by the non-delivery, or by the delay of the delivery of it, by the neglect of the carrier or his servants.[9]

The last case cited is certainly not a little of a manifestation of a disposition, in the English courts, to restore, as far as practicable, the reasonable responsibility of carriers, which under the former decisions, with reference to notices, and special contracts, had become uncertain and somewhat problematical.[9]

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6 Boys *v.* Pink, 8 C. & P. 361. And in Baxendale *v.* Hart, 9 Eng. L. & Eq. R. 505, in error, reversing the judgment below, the court say: "We think that the act of parliament requires the person who sends the goods, to take the first step by giving that information to the carrier which he alone can give, and that if the sender does not take that first step, then he cannot maintain this action by the force of the first section, which expressly says, that the carrier shall not be liable unless the declaration is made. Such declaration, when made, will lead to other consequences; the carrier will know what he is to have more, according to the tariff which he has stuck up in his office; if that sum is paid, and the goods are lost, then of course he would be liable; on the other hand, if he refuses to give a receipt, as provided by the statute, or has omitted to comply with any provision of that kind on his part to be performed, he would lose the protection given by the act."

7 Pianciani *v.* London & S. W. Railway, 36 Eng. L. & Eq. R. 418; Crouch *v.* London & N. W. Railway, 25 Eng. L. & Eq. R. 287.

8 Hearn *v.* London & S. W. Railway, 29 Eng. L. & Eq. R. 494.

9 *Ante*, § 132, 133, 134, and cases cited. The statute now in regard to freight generally refers the terms of special contracts to the court, as to their reasonableness.

In Simons *v.* The Great Western Railway Co. 37 Eng. L. & Eq. R. 286, it

*SECTION XVIII.

INTERNAL DECAY. BAD PACKAGE. STOPPAGE IN TRANSITU. CLAIM BY SUPERIOR RIGHT.

1. *Internal decay. Defective package.*
2. *Right to stop* in transitu.
3. *Carrier liable, if he do not surrender the goods, to one having right to stop* in transitu.
4. *Carrier may detain until right is determined.*
5. *Right exists, as long as the goods are under control of carrier.*
6. *Most uncertainty exists, in regard to capacity of intermediate consignees.*
7. *As long as goods are in the hands of mere carriers, right exists, but not when they reach the hands of the consignee's agent for another purpose.*
8. *Company compellable to solve question of claimant's right, at their peril.*
9. *Conflicting claims of this kind may be determined, by replevin, or interpleader.*
10. *Or the carrier may deliver the goods to rightful claimant, and defend against bailor.*

§ 141. 1. In addition to the general exceptions, which the law makes to the liability of carriers, of losses from inevitable acci-

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was held, that the 7th section of the Railway & Traffic Act, 1854, 17 & 18 Vict. c. 31, does not prevent a railway company from making a special contract, as to the terms upon which they will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods.

And it is for the court to say, upon the whole matters brought before them, whether or not the "condition," or "special contract," is just and reasonable.

A condition, that the company will not be accountable for the loss, detention, or damage of any package insufficiently or improperly packed:—

Held, unjust and unreasonable.

Semble, that a condition "that no claim for damage will be allowed, unless made within three days after the delivery of the goods, nor for loss, unless made within three days of the time that they should be delivered," is just and reasonable.

A condition, that in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, however caused,—is just and reasonable.

And in the London & Northwestern Railway Co. Appellants, *v.* Robert Clarke Dunham, Respondent, (id. 299,) which was a case sent by a county court judge for the opinion of the Court of Common Pleas, it was stated that goods were received by the defendants, a railway company, under the following note, signed by the plaintiff: "Risk note. London & Northwestern Railway Company, Park Lane Station, Dec. 19, 1855. Hay, straw, furniture, glass, marble, china, castings, and other brittle and hazardous articles, &c., conveyed at the risk of the owners.—Delivered to London and Northwestern Railway Company, from R. C. Dunham, (the plaintiff,) 3 crates beef, for F. C. Duckworth, Newgate Market, to be forwarded from Liverpool to London at owner's risk"—it was held that the court could not, from this statement, judge whether or not the condition was "just and reasonable" within the 17 & 18 Vict. c. 31, § 7.

dent, * and the public enemy, there are some others, more or less connected with those, which it may be proper to mention. Losses

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Jervis, Ch. J., in delivering the opinion of the court, in both cases, said: "The result seems to be this,—a general notice is void; but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and, whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security, that the court shall see that the condition, or special contract, is 'just and reasonable.'

"Applying that rule to the case of Simons *v.* The Great Western Railway Co. I think the matter is sufficiently brought before the court to enable us to decide it, and that the fourth plea, which states that the goods were received by the company to be carried at a certain special mileage rate, and under and subject to a special contract, (referring to the 15th article of the conditions set out in the replication,) is a good plea. As to the third plea, I think that is a bad one, inasmuch as it seeks to relieve the company from the consequences of the loss or non-delivery of the goods, by reason of insufficient or improper package, which, in my judgment, is not reasonable as a ground of relief. I think the court is bound to look at the particular matter, in each case, to see whether the condition is just and reasonable, or not.

"As to the case of the Great Western Railway Company, Appellant, *v.* Dunham, Respondent, the same reasons to a certain extent will apply. In order to see whether or not the contract be just or reasonable, it is necessary that we should be furnished with proper materials. The judge of the county court has referred it to us to say whether or not the conditions contained in the 'risk note, limiting the liability of the company, were unjust and unreasonable, without telling us the circumstances under which the contract was made, or what is the nature or the reason of the particular risk. I therefore think enough is not disclosed to enable us to come to any conclusion as to whether or not the contract or condition is just and reasonable.

"For these reasons, I think that, in the first case, our judgment ought to be for the plaintiff, upon the issue in law raised upon the third plea, and for the defendants as to the fourth plea; and that the second case must go back for the purpose of being more fully stated."

So that now, by this late statute, the law of that country is brought back nearly to its original starting-point. Mere general notices, in regard to the liability of carriers, are of no avail, unless reduced to the form of special stipulations, in regard to the liability of the carrier, and signed by the party sending the goods, and be also, in the opinion of the court before whom the case shall be tried, "just and reasonable."

This act, it is specially provided, shall not affect the Carriers' Act, or any liability under it. But in a late case in the Common Bench, it was held, that where the carrier, in the bill of lading expressly excepted losses from "leakage and breakage," this exception did not extend to such losses, which occurred from his own negligence, but only such as occurred without his fault. Phillips *v.* Clark, 29 Law Times, 181.

*from natural causes, such as frost,[1] fermentation,[2] evaporation,[2] or natural decay of perishable articles,[2] the carrier exercising all reasonable care to preserve them,[2] and from the natural and necessary wear by careful transportation,[2] in the mode to which

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And where the railway company received cattle for carriage on the express terms, in writing, signed by the owner, that they were to be held free from all risk and responsibility in respect of any loss or damage to cattle, arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in transit, from fire, or any other cause whatsoever, it was held to be a reasonable condition within the Railway and Canal Traffic Act, 1854.

And it was said that this protected the company from liability for the loss of cattle, by suffocation, during the journey, occasioned by the negligence of company's servants. But it was further said, that the facts of this case did not tend to show negligence in the company's servants, the plaintiffs being permitted to send, free of expense, a person who had the oversight of the cattle, and who made no complaint of the sufficiency and safety of the arrangements for transportation. *Alderson*, B., said: "I think the negligence was really that of the servants of the plaintiff, and that the defendants are not liable on that ground." Pardington *v.* South Wales Railway, 38 Eng. L. & Eq. R. 432.

[1] *Ante*, § 124, and note 6.

[2] Buller's N. P. 69; 3 Kent, Comm. 299, 300, 301; Story on Bailm. § 492*a*; Warden *v.* Greer, 6 Watts, 424.

It has been considered, that where molasses in a cask of large dimensions, was found to have lost, by leakage, through the pressure of the weight of the cask, upon the bilge of the staves, the cask being admitted to be of sufficient strength, for ordinary transportation, but the road being rough at the time, by reason of frost, it did not remain firm, on account of not being placed upon supports, so as to divide the pressure upon the cask, more equally, that the carrier was liable for the loss. Stocker & White *v.* Sullivan Railway, Special Reference. Angell on Carriers, § 210, 211, 212. Mr. Walford cites a number of cases, pp. 315, 316, illustrating the subject of this note, from the then recent *Nisi Prius* trials.

The company are not liable for an accident arising from the viciousness or want of temper, of an animal sent by their railway. Walker *v.* London & Southwestern Railway, (1843.) So also from injuries to merchandise from bad package. Norman *v.* London & Brighton Railway, (1843.) So also for leakage, by reason of bad package. Lucas *v.* Birmingham & Gloucester Railway, (1842.) So also where goods are unreasonably exposed to fire, for want of proper covering. Rutley *v.* Southeastern Railway, (1845.)

And where the owner put several packages, one of flutes, one of watches, &c. into the same bag, and sent them by railway, and the flutes were injured, it was left to the jury to say, whether the accident was attributable to the carelessness of the company, or whether the plaintiff, by his own improper proceeding, contributed to the disaster, the mode of packing, having thrown upon the company a more onerous task than if they had received the articles separately. Smith *v.* London & Birmingham Railway, (1845.)

But the consignee of goods well packed is not obliged to accept of a remnant

the carrier is accustomed; or from the defective nature of the vessels, or packages, in which the things are put, by the owner, or consignor, the former class being regarded as the act of God, and the latter the fault of the party, will excuse the carrier.

2. In regard to stoppage *in transitu*, it is a subject which, in its general bearing, does not properly come within the range of this work, but as it incidentally affects the rights of common carriers, in all modes, it may be useful to give here its general definition, and briefly point out the mode in which carriers are liable

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of them, in a loose, unpacked state. Ch. & Rock Is. Railway *v.* Warren, 16 Ill. R. 502; *ante*, § 131. And in a recent trial at *Nisi Prius*, before Mr. Justice Woodward, of the Pennsylvania Supreme Court. Ritz & Pringle *v.* Penn. Central Railw. 10 Am. Railw. Times No. 14, where the defendants claimed to excuse themselves from liability for injury to sheep transported on their cars, by reason of too many being put into a car, on the ground that this was done by the agents of the consignor, the agents of the company telling them to exercise their own judgment in regard to the number they would put into each car; the learned judge told the jury that the company could not, in that manner, shift the responsibility which the law imposed upon them. The remarks of the judge in his charge to the jury are marked by a proper regard to the interests of all concerned, and will, we trust, meet with general approval. "In my judgment this is no defence. They were bound to superintend the loading of the sheep. The cars belong to the company, and are, and ought to be, under the exclusive control of the company's agents. They are presumed to know better than freighters and drovers how many tons' weight, or how many animals each car can carry safely, and it is due, alike to the comfort of the dumb beasts, and to the interest of all concerned in the transportation, that the skill and experience of the agents in charge, should dictate every thing that pertains to the taking or carrying and discharging the load. The less inexperienced persons have to do with these matters the better, and to turn such duties over to them is negligence on the part of the company's agents. They have storehouses in which to receive and load goods, and the shipping merchant is never expected or permitted to direct how many cars shall be employed in the transportation of his wares, nor what quantity shall go in each car. In like manner, the company is provided with cattle yards and pens into which they receive live stock, and their duties as common carriers attach from the moment they take possession of the stock. They may call on the owner or his servants to assist in loading the live stock, nay, they may require them to do all the manual labor as best acquainted with the disposition and habits of the beasts, but it must be done under the practised eye of the company's agent, whose duty it is to see that the car is roadworthy, and that it is properly loaded. He may no more resign this duty to the drover than to the freighting merchant, and may no more neglect this duty than any other connected with the transportation. If, therefore, the jury believe that Boyle stood by and permitted the cars to be overloaded, whereby the sheep were injured, the company is liable for the consequences of his negligence."

to be affected, by the exercise of the right. Stoppage *in transitu* is the right which resides in the vendor of goods, upon credit, to recall them, upon discovering the insolvency of the vendee, before the goods have reached him, or any third party has acquired *bonâ fide* *rights in them.[3] The carrier's interest in this question arises only, when he is required by the vendor, while the goods are still in his possession, to redeliver them to him, or some one, on his account.

3. After such demand it becomes important to the carrier to determine, whether the right to reclaim the goods still exists. For if so, and the carrier decline to redeliver them, or deliver them to the vendee, he, and all persons claiming to retain them, against the claim of the vendor, become liable in trover for their value.[4]

4. The principal difficulty which arises in such cases, so far as the carrier is concerned, will be likely to occur, in regard to goods, which have passed through one or more carrier's hands, before they come into those of the one, upon whom the demand for the goods is made. For in the case of a single carrier, he may safely conclude, that if such a demand is made upon him, while the goods are in his custody, it will be prudent to retain them until the existence of the asserted right is established, and if so, to surrender them, in obedience to the demand, as there can be no question of the right of the unpaid vendor ordinarily, to reclaim the goods, in case of the insolvency of the vendee, as long as they remain in the possession of the carrier.[5]

5. It is not enough to defeat this right, that the transportation

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[3] 2 Kent's Comm. 540 *et seq.*; Lickbarrow *v.* Mason, 1 Henry Black. R. 357; s. c. 6 East, 21; s. c. 2 Term R. 63; 1 Smith, L. C. 388 and notes, where the whole law upon the subject, both English and American, will be found.

This leading case establishes the point, that the vendee may defeat the right of the vendor to stop the goods, *in transitu*, by a *bonâ fide* assignment of the bill of lading, for value. And we are not aware, that the right can be defeated, in any other mode, until the goods come to the virtual possession of the vendee.

[4] Litt *v.* Cowley, 7 Taunt. 169; Bothlink *v.* Inglis, 3 East, 381; Syeds *v.* Hay, 4 T. R. 260.

[5] See the cases cited under note 3. And it would not be regarded, as a conversion, in the carrier, to retain the goods, after a demand from the vendor, for a sufficient time, to enable him to ascertain, whether the right to stop *in transitu* ever existed, and if so, whether any intervening rights had accrued, either by act of the vendor, or the vendee, which would defeat it.

is accomplished, if the goods still remain under the care and control of the carrier, as in the case of a railway, in the warehouse of the company, awaiting the arrival of the vendee; or in the warehouse of a wharfinger, or warehouse-man;[6] unless, as is said, in some of *the cases, the vendee, by special contract and understanding, is accustomed to use the warehouse of the carrier, or wharfinger, as his own. In such case it is the same, when the goods are deposited in the warehouse of the carrier, or warehouse-man, or wharfinger, as if they had reached the warehouse of the vendee himself.[7]

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[6] Dodson *v.* Wentworth, 4 Man. & Gr. 1080, where Ch. J. *Tindal* thus states the distinction, between the cases, where the transitus is ended, by depositing in the warehouse of the carrier, or other person, and those where this does not have that effect.

"The warehouse in which the goods were lodged was not the warehouse of the carrier; as some of the cases turn upon the point, that the transitus is not at an end, while the goods remain in the possession of the carrier, not only in the actual course of the journey—but even while they are in a place of deposit, connected with transmission. But the place of deposit here is the warehouse of a third party," and the question is whether the depositary acts "as the agent of the carrier, or the consignee."

[7] Rowe *v.* Pickford, 8 Taunt. R. 83. This is the case of a trader in London, who was in the habit of purchasing goods in Manchester and exporting them to the Continent soon after their arrival in London, and the goods in the mean time remained in the wagon-office of the carriers. It was held that the right of stoppage *in transitu* ceased, upon the arrival of the goods, at the wagon-office.

Wentworth *v.* Outhwaite, 10 M. & W. 436. This is the case where the goods were kept, by the carrier as warehouse-man at the end of the public carrier's route, until they could be sent for by the vendee, at his own convenience, and upon payment of warehousing. It was held the transitus terminated upon the arrival of the goods, at the warehouse. This case is put by *Abinger*, Ch. B., with whom the court concur, upon the ground, that the warehouse-man was an agent of the vendee, for receiving the goods and keeping them, *not for forwarding*, which showed the transitus at an end. Baron *Parke* also said: "The carriers held them, not as agents for forwarding them, but for their safe custody, and they were constructively in the possession of the vendee." Dodson *v.* Wentworth, 4 M. & Gr. 1080, is a similar case, and decided upon the same ground. Dixon *v.* Baldwin, 5 East, R. 175. In Heinecke *v.* Earle, 30 Law Times, 147, in Nov. 1857, goods were shipped by order to A, and the bill of lading made them deliverable to A, on paying freight; but on their arrival, A, being embarrassed, and not wishing to accept the goods, if he stopped business, objected to receive them, but they were afterwards landed and locked up in his warehouse, A intending to warehouse them for the vendor, if he could so do. The vendor demanded the goods, and A declined surrendering them, on the ground that his solicitor ad-

6. But by far the most difficult questions arise under this head, in a class of cases, quite numerous, where the goods are directed, by a particular route, through successive lines of carriers, and at the intermediate points, to the care of particular persons, who may be wharfingers, forwarding-merchants, warehouse-men, carriers, or combining two, or more of these capacities.

7. The principle, by which the question of the continuance of the transitus is determined, in this class of cases, is the same already stated. If the person to whose custody the goods are consigned, at an intermediate point, is only to be regarded, as an agent, for forwarding, or keeping, or carrying, in the course of the transportation, then the transitus is not ended. But upon the other hand, if such person, although a carrier, or connected with the carrying business, is to keep the goods, for the consignee, and, as his agent, or, in that capacity, to give them a new destination, *or so to keep them until the consignor can send for them, or dispose of them, or give them a new destination, in all these cases, the transitus is ended.[8]

8. Railway companies from the manner of transacting their business, would not be likely to be exposed to the raising of such questions very often, while the goods were in their custody. But as many of the long lines of transportation consist of numerous, independent routes, and often, in different countries, states, or kingdoms, such questions very frequently arise, upon prior portions of the line, which they are by the rules of law compellable to solve, at their peril, upon an admonition, by telegraph, from an

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vised him he could not do so safely. The goods were subsequently assigned for the benefit of creditors; it was held that the transit was at an end.

Lord *Campbell*, Ch. J., said: "A mere delivery at the place of destination is not necessarily a termination of the transit. The transit remains until the goods have come into the possession of the consignee, and although they are landed at the place to which they are destined, unless the consignee has taken possession of them, I think they are still in transit. The merely putting upon the premises of the consignee, I think, could not necessarily be a termination of the transit." But in this case, it was held, the consignee's consent to retain them determined the transit.

[8] Cases cited under note 7. See also Covell *v.* Hitchcock, 23 Wend. 611. And where it is the practice of a carrier, at a particular place, to deposit goods upon a public wharf and for the consignees to come and take them away at their pleasure, no one having any further charge of them, it was held, that the transitus ended, upon the goods reaching the wharf. Sawyer *v.* Joslyn, 20 Vt. R. 172.

unknown party, a thousand miles distant, which renders it of consequence, that they should be able to obtain competent counsel upon questions of this character.[9] It is the same, in regard to all goods, put into the custody of a carrier by a subordinate party if demanded, by the party having superior right, the carrier must surrender them to him, or he is liable in trover, if the goods still remain in his possession, otherwise if he have finished his office in regard to them.[10]

9. There seems to be some confusion in the cases in regard to the right of a third party to interpose his claim between the bailor and bailee. It is perfectly well settled that the bailee cannot defend against the claim of the bailor, by showing a better outstanding title to the thing, in a third party, who has made no claim upon him.[11] But it is settled, that the bailee may defend against the claim of the bailor, by showing the goods have been taken from him by legal process.[12] Hence in cases of this kind the more common course is, for the interposing claimant to resort to the writ of replevin; and sometimes to a writ of interpleader, in order *to settle the rights of the contending parties, if no other adequate remedy exists.

10. But we apprehend there is no necessity for any such resort. Wherever the bailor obtains possession of the goods, by force or fraud, or attempts to retain possession of them, through the carrier, after his title has expired, in analogy to the case of landlord and tenant, the bailee may, upon having notice to surrender the goods to the rightful owner, under penalty of a suit, yield to the claim of the rightful proprietor, and defend against that of the fraudulent or wrongful bailor.[13] And as is said be-

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[9] Gilford, Clark & others *v.* Smith, Eldridge & Lee, Trustees of the Vermont Cent. Railway, a case involving these questions, in Supreme Court of Vermont.

[10] Ogle *v.* Atkinson, 5 Taunt. 759; Wilson *v.* Anderton, 1 B. & Ad. 450. It is a good defence to the carrier, that he has surrendered the goods, according to the order of the bailor, before he receive counter orders from the superior owner, and until that the carrier cannot dispute the title of his bailor. Story on Bailm. § 582.

[11] Gosling *v.* Birnie, 7 Bing. 339; Holl *v.* Griffin, 10 Bing. 246.

[12] Burton *v.* Wilkinson, 18 Vt. R. 186. If this defence were not valid, it might compel the party to resist the acts of a public officer, in the discharge of his duty, which the law will never do.

[13] *Post*, § 145; Swift *v.* Dean, 11 Vt. R. 323; Turner *v.* Goodrich, 26 Vt. R. 707.

fore, the rule seems now to be settled, that in such case the carrier must deliver the goods to the rightful owner, at his peril.[14]

SECTION XIX.

EFFECT OF BILL OF LADING UPON CARRIER.

1. *Between consignor and carrier the bill of lading is* primâ facia *evidence.*
2. *But questions of quantity and quality of goods cannot be raised where intermediate carriers are concerned.*
3. *Bill of lading may be explained by oral evidence.*
4. *Express promise to deliver goods, in good order, by a day named.*
5. *Effect of stipulation for deduction from freight, in case of delay.*
6. *If carrier demand full freight, in such case he is liable to refund.*
7. *Must be forwarded according to bill of lading.*

§ 142. 1. It is common for a bill of lading or the receipt for goods, executed by the station agent, to describe them as in good condition. In such case this is always *primâ facie* evidence against the carrier of that fact, even between the immediate parties to the contract, and may become conclusive upon the carrier, where the consignee or other parties have acted upon the faith of such representation, and have made advances, or given credit, relying upon its truth.[1]

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[14] Story on Bailm. § 450. *Littledale*, J., in Wilson *v.* Anderton, 1 B. & Ad. 458. "He may show that the title of the lessor has been put an end to; and therefore in an action of covenant by the lessor, a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to distrain, or bring an ejectment, by a person having good title, would be equivalent to an actual eviction."

[1] *Shaw*, Ch. J., in Hastings *v.* Pepper, 11 Pick. 43; United States Cir. Court, N. Y. Dist. 7 W. Law J. 302; Price *v.* Powell, 3 Comstock, 322. Declarations of the master, while in charge of the goods, are evidence against the ship-owner. McCotter *v.* Hooker, 4 Selden, 497, where it is held, that a mere receipt for the goods, does not merge the previous oral agreement.

But where the packages are described in the bill of lading, "weight and contents unknown," and one of them is in bad condition on arrival, and the mode of packing is such, that it would not readily have been discovered, it requires proof that it was not so when delivered. U. S. Circuit Court, *Nelson*, J., The Columbo, 19 Law Rep. 376. In McCready *v.* Holmes, 6 Law Reg. 229, in the District Court of the United States for the district of South Carolina, in October, 1857, it was held, that though a carrier, in the absence of evidence of fraud or mistake, is concluded by the receipt or bill of lading, as to the quantity or amount of the goods shipped; yet, in an action for the freight, where the consignee has

*2. But in regard to parties who have no direct interest in the goods, and no authority to adjust any deficiency or damage; who are but intermediate carriers, or middle-men, between the consignor and consignee, such questions cannot be raised, in an action for freight.[2]

3. But where the bill of lading is given, when the goods are so packed as to be incapable of inspection, and prove to have been in fact damaged when they were shipped, this may be shown by oral evidence.[3]

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received the goods at the wharf, without qualification or reservation of the right, to inspect, weigh, or measure them, and the carrier proves due care of them during the transit, and an actual delivery of all in his possession on his arrival, the burden of proof is on the consignee to establish that a deficiency in the quantity specified in the bill of lading, afterwards discovered, is chargeable to the wrongful act or neglect of the carrier.

2 Canfield *v.* The Northern Railway Co. 18 Barb. 586. In this case, a quantity of wheat was shipped, at Detroit, on board the ship Argo, for Ogdensburg, consigned to B. & L., Montpelier, Vt. care of Northern Railway Co. N. Y. The master delivered the wheat to defendants, in pursuance of the bill of lading, but on measurement it fell short one hundred and seventy-five bushels of the quantity named in the bill. The master demanded freight of defendants upon the quantity carried and delivered, which defendants refused to pay, but offered to pay freight, deducting the deficiency in the wheat. This suit is for the freight demanded. Defendants claimed,

1st. They were not liable for freight, and if so,

2d. They had tendered all the plaintiffs were entitled to demand of them.

It was held, that defendants were liable to the plaintiff, for the freight actually earned on the wheat delivered.

On the first point in the defence, the court say, "the usual clause in a bill of lading, making the payment of freight by the consignee a condition of the delivery of the goods, is inserted for the benefit of the carrier. It is regarded as a letter of request from the consignor, and the reception of the property causes an implication that the consignees intend to comply with the request. The law implies a promise upon which the carrier may found an action for the freight. Abb. on Ship. 421; 3 Kent, 219; 3 Bing. 383. This is the settled rule as regards the *final* consignee named in the bill. I see no good reason why a rule which looks with a single eye to the rights of the carrier, should not be applied to every consignee named, whether *final* or *intermediate*."

As to the second point, the court say substantially, that defendants were middle-men, all their powers and rights are derived from the terms of the bill of lading, as intermediate consignees, and there is no agency in behalf of the owner, authorizing the defendants to make any adjustment. See also Bissell *v.* Price, 16 Illinois R. 408.

3 Gowdy *v.* Lyon, 9 B. Mon. 112. And a bill of lading for a specified number of tons of iron, "weight unknown," binds the carrier, in the absence of fraud,

*4. The stipulation in a bill of lading to deliver goods within a specified time, in good order, "the dangers of the railway, fire, leakage, and other unavoidable accidents excepted," binds the carrier to deliver within the time absolutely, the exception having reference exclusively to the condition of the goods[4] when delivered.

5. And an agreement to deliver, at the place of destination, on a day named, with a provision that the carrier shall deduct a fixed sum from the freight for each day's delay beyond that time, was held to be an unconditional contract to deliver by the day named.[4] But the reason and good sense of the case would seem to indicate that if the carrier made the stipulated deduction from freight, fixed in his contract for the delay, he was not liable beyond that for delay merely, and so the court seem to have viewed the subject.

6. But where the carrier in such case demanded full freight, not consenting to deduct the price fixed in the contract for the delay, it was very justly held to be a payment, by duress of circumstances, and the excess recoverable of the carrier.[4]

7. In an important case,[5] recently determined by an experienced court, it was held that where the bill of lading required the goods to be reshipped at an intermediate port, by a particular ship, and they were reshipped in another ship, that the contract had not been complied with, and that the carriers must be considered as insuring the goods against loss, even if it arose from causes excepted by the bill of lading. And where goods are delivered to a railway company, for carriage, and a receipt taken

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to deliver only so much as he actually receives. Shepherd *v.* Naylor, 19 Law R. 43; Bissell *v.* Price, 16 Illinois R. 408.

[4] Harmony *v.* Bingham, 1 Duer, 209. In this case the covenants to deliver, in a specified time, and in good order, and for the deduction, in case of failure, were separate covenants.

The recovery was in fact limited to the damages specified in the contract, thus making, in effect, a contract to deliver by a certain day, or deduct a certain sum for each day's delay from the freight.

[5] Bazin *v.* Richardson, Circuit Court of the U. S. Philadelphia, May, 1857; Law Reporter, July, 1857, 129. Merrick *v.* Webster, 3 Mich. R. 268. And in Bristol *v.* Rensselaer and Saratoga Railway, 9 Barb. 158, it was held that the receipt of a package marked "L. W. B., care of S. W., Troy," by a railway agent, implied the duty to deliver, according to the mark, and nothing more, although S. W. is another agent of defendants.

by the consignor, upon which he obtains an advance by the consignee, the consignor subsequently obtaining a redelivery of the goods to himself, and the company in consequence being compelled under threat of legal proceedings against them, to refund to the consignee the money advanced by him, it was held they might recover the amount so paid, of the consignor.[6]

*SECTION XX.

TO WHAT EXTENT THE PARTY MAY BE A WITNESS.

1. *At common law the party could not be a witness in such cases.*
2. *Some of the American courts have received this testimony from necessity.*
3, 4, 5. *Decisions in different states.*
6. *Agents and servants of the company admitted to testify from necessity.*
7. *Where the party's oath is not received, the jury are allowed to go upon reasonable presumption.*

§ 143. 1. The question, how far the party claiming to have sustained loss, by carriers, may be himself a witness in the action, since the general disposition manifested, both in England and this country, to admit the testimony of the parties generally, is becoming of much less importance. We will nevertheless refer briefly to the decisions upon this subject. We are not aware that any such exception was ever attempted to be made by the English courts. The general rules of evidence seemed altogether adequate to the exigency. If the carrier had lost the package or parcel, it was by his fault that the difficulty of ascertaining its contents had arisen, and the jury should, on that account, solve all doubts against him.[1]

2. But in many of the American courts, it had been regarded, as one of those exceptions, founded upon necessity, like the loss of a written instrument, where it became indispensable to admit the testimony of the party, the facts being, in presumption of law, confined exclusively to his knowledge. And some of the English books speak of the same rule being applicable to the proof of the contents of a box delivered to, and lost by, a com-

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6 Midland Great Western Railway *v.* Benson, 30 Law Times, 26.

1 Greenleaf's Ev. § 37; Armory *v.* Delamirie, 1 Strange, 505. But the decisions are not uniform upon this subject, especially where there is no intentional withholdiog of evidence. In such case it has been held the presumption is to be against the plaintiff. Clunnes *v.* Pezzey, 1 Camp. 8; Dill *v.* Railroad Co. 7 Rich. 158, 163; 6 id. 198.

mon carrier.[2] But it does not seem to have been there followed, in recent times, unless the case possessed other features beyond the mere loss of the box, as fraud, or the intentional withholding of evidence. And some of the American cases, where the testimony of the party was admitted, as to the contents of parcels delivered to carriers, and lost by them, have been of the latter character.[3] The American * courts have evidently admitted the exception with reluctance, and have manifested a constant disposition to restrain it within the narrowest limits.

3. Hence in Pennsylvania they hold that it only extends to such articles of wearing apparel, as it may ordinarily be presumed the party himself, or his wife, will have packed, and consequently be the only witnesses able to give testimony[4] in regard to them.

4. And in Massachusetts the courts have altogether repudiated the rule of the admissibility of the party, as a witness in this class of cases on the ground of necessity.[5]

5. But in Ohio the courts seem to have adopted the same view of the subject as in Maine and Pennsylvania.[6]

6. In some cases it has been held that the servants of the company, who have charge of things carried on their trains, are *ex*

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2 12 Viner, Ab. 24, pl. 34.

3 Herman *v.* Drinkwater, 1 Greenleaf, R. 27. This is the earliest case we recollect to have seen of this kind in the American Reports, and was one of fraud, where a shipmaster, having received a trunk of goods on board his vessel, for carriage, broke it open and abstracted the goods. This case is virtually reaffirmed in Gilmore *v.* Bowdoin, 3 Fair. 412, and the exception rests here altogether upon the ground of necessity.

4 Clark *v.* Spence, 10 Watts, R. 335. See also David *v.* Moore, 2 W. & Serg. 230; Whitesell *v.* Crane, 8 W. & Serg. 369; McGill *v.* Rowand, 3 Barr, 451. See also The County *v.* Leidy, 10 Barr, 45; Pudor *v.* Bos. & M. Railway, 26 Maine R. 458; Dibble *v.* Brown, 12 Ga. R. 217.

5 Snow *v.* The Eastern Railway Co. 12 Met. R. 44. The court here recognize the right of the party to testify to the contents of a parcel of which he is robbed. Proceedings against the Hundred, B. N. P. 187; East Ind. Co. *v.* Evans, 1 Vern. 305. The same rule upon this subject is adopted in New Jersey as in Massachusetts. Graby *v.* Camden & Amboy Railway, 19 Law Rep. 684. So also in Michigan. Wright *v.* Caldwell, 3 Mich. 51.

6 The Mad River & L. Erie Railway Co. *v.* Fulton, 20 Ohio R. 318. In this case it was held, that the owner of baggage and his wife are competent witnesses to prove the contents of a trunk lost by the plaintiffs, and its value, consisting of the ordinary baggage of a traveller, on the ground of necessity. See also Johnson *v.* Stone, 11 Humph. 419; Oppenheimer *v.* Edney, 9 id. 385.

necessitate, competent witnesses, to prove the delivery thereof to the owner, in an action for the non-delivery, although they thereby exonerate themselves from blame, and liability, in a future action.[7]

7. The authorities upon this general subject are not uniform. And where the courts refuse to admit the party to testify to the contents of trunks, &c. lost by common carriers, it becomes matter of necessity to allow the jury to give damages proportioned to the *value of the articles, which it may fairly be presumed the trunk, &c. might and did contain.[8]

By the construction of the statute in Kentucky,[9] the members of railway corporations are made witnesses, in suits where the company is a party.

SECTION XXI.

EXTENT OF RESPONSIBILITY FOR BAGGAGE.

1 and 5. *Not liable for merchandise, which passenger carries covertly.*
2. *And it makes no difference, that the passenger has no other trunk.*
3. *Jewelry, being female attire, and a watch in a trunk, proper baggage.*
4, and n. 6. *So also are, money for expenses, books for reading, clothing, spectacles, tools of trade, and many other similar things.*

§ 144. 1. Railways, as carriers of passengers, are not liable for the loss of a package of merchandise, which a passenger brings upon the train, packed as baggage, unless the company, having an opportunity to know the contents of the package, see fit to accept it as baggage.[1]

2. So the word baggage was held not to include a trunk, containing valuable merchandise, and nothing else, although it did not appear the passenger had any other trunk with him;[2] nor

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7 Draper *v.* Worcester & N. Railway, 11 Met. 505; Moses *v.* Bos. & M. Railway, 4 Fos. 71, 80.

8 Dill *v.* Railroad, 7 Rich. 158; Stadhecker *v.* Combs, 9 Rich. 193.

9 Civil Code, § 675; Covington & Lexington Railway Co. *v.* Ingles, 15 B. Monr. 637.

1 Great Northern Railway *v.* Shepherd, 9 Eng. L. & Eq. R. 477. In this case, the court gravely declare, that a husband and wife, travelling together, may take 112 lbs. baggage, the limit for one person, by act of parliament, being fifty-six pounds.

2 Pardee *v.* Drew, 25 Wend. 459. It was held that "thirty-eight pairs of new

samples of merchandise carried to enable the passenger to make bargains.[3]

3. In one case the carrier was held responsible for articles of jewelry, carried among baggage, which were a part of female dress, the plaintiff travelling with his family, such articles being treated *without question, as forming a part of the passenger's baggage.[4] So a watch carried in one's trunk is proper baggage.[5]

4. But railways, as carriers of passengers, are not liable, for money, which passengers may carry as baggage, beyond a reasonable amount for travelling expenses.[6] The passenger is

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shoes, sixty pairs stock for boy's shoes, and two papers shoe-nails," is not included under the term "baggage." Collins *v.* Boston & Maine Railway, 10 Cush. R. 506.

[3] Hawkins *v.* Hoffman, 6 Hill, 586; Dibble *v.* Brown, 12 Ga. R. 217. But where a passenger delivered a box, containing embroideries, to the agent for receiving baggage, and demanded a check for the place of his destination, and was told, that the company "did not check such goods," but that they would go safely, it was held the company was liable for the loss of the box, as common carriers, on the ground that there was no attempt to deceive them, or to have the parcel pass as baggage, unless they consented, and if they consented to accept and carry it, in a passenger train, they were liable, and might charge freight the same as if they carried it upon their freight trains. This seems to be a very reasonable view of the case. Butler *v.* Hudson River Railw. 3 E. D. Smith, 571. But there must be some proof that the person accepting the parcel was the proper agent for that purpose, or that it was placed in the companies' cars. Ib.

[4] Brooke *v.* Pickwick, 4 Bing. 218; McGill *v.* Rowand, 3 Barr, 451. In Whitmore *v.* Steamboat Caroline, 20 Mo. R. 513, it was held not to be within the ordinary duty of a steamboat, as a common carrier, to transport specie, and that the officers could not bind the proprietors by such an undertaking, unless by proof of a usage, and that a passenger's baggage only included specie to the extent of his probable expenses.

[5] Jones *v.* Voorhies, 10 Ohio R. 145.

[6] Orange Co. Bank *v.* Brown, 9 Wend. 85; Weed *v.* Saratoga & Schen. Railway, 19 Wend. 534.

In the case of Jordan *v.* Fall River Railway, 5 Cush. R. 69, the rule, in regard to money carried, by a passenger, as part of his baggage, is thus laid down by *Fletcher*, J.: "Money *bonâ fide* taken, for travelling expenses and personal use, may properly be regarded, as forming a part of the traveller's baggage." And this is perhaps as satisfactory and as definite a rule as the subject admits of. Taylor *v.* Monnot, 1 Abbott's Pr. R. 325.

In Tennessee, it seems to have been considered, that money beyond expenses, or a watch, are not a proper part of one's baggage in travelling. Bomar *v.* Maxwell, 9 Humphrey, 621. And in the case of Doyle *v.* Kiser, 6 Porter, (Ind.) R. 242, where a passenger, on a canal boat, had $4,000 in gold in his carpet-bag, which he did not name to the officers of the boat, and which was stolen during his

allowed to take not only money sufficient to defray the ordinary expenses of the journey contemplated, but any reasonable sum, in addition, for such contingencies as are not improbable.[7]

5. And where the plaintiff sent, by a passenger train, a quantity of merchandise, expecting to go himself in the same train, but did not, and the goods were lost, without any gross negligence, or any conversion, by the carriers, it was held they were not liable.[8]

*SECTION XXII.

CARRIERS' LIEN FOR FREIGHT.

1. *Lien exists, but damage to goods must be deducted, and freight must be earned.*
2. *But if freight be paid through, to first carrier, lien does not attach, ordinarily.*
3. *A wrongdoer cannot create a valid lien against the real owner.*
4, 5, 6, 7, 8. *Illustration of the point last stated.*
9. *Passenger carrier has lien upon baggage for fare.*
10. *Carriers have no lien for general balance of account.*
11. *Lien may be waived, in same modes as other liens.*
12. *Delivery obtained by fraud, goods will be restored by replevin.*
13. *Last carrier in the route may detain goods, till whole freight paid.*
14. *Carrier cannot sell goods in satisfaction of lien.*
15. *Owner may pay freight, and sue for goods lost.*
16. *Carrier is bound to keep goods reasonable time, if refused by consignee.*

§ 145. 1. As a general rule, the carrier is entitled to a lien upon the goods carried, for freight.[1] But if he once deliver the

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passage, it was held the carriers were not liable, beyond the value of the ordinary articles of baggage lost. *Perkins*, J., enumerates, as such, "clothing, travelling expense money, books for reading and amusement, a watch, ladies' jewelry for dressing." A gold watch and gold spectacles were held such in the case of the Steamer H. M. Wright, Newberry's Admiralt. R. 494. And in Davis *v.* Cayuga & Susquehannah Railway, 10 How. Pr. R. 330, it was held, that a harness-maker's tools, valued at $10, and a rifle, were to be regarded, as properly forming a part of the passenger's baggage on a railway, and that the possession of the company's check was *primâ facie* evidence of his having been a passenger on their trains, and that he had baggage checked on that occasion, the possession of the check being accompanied with proof of the custom of the company, to put checks upon all baggage, where it was required, and to give duplicates to the passengers.

7 Johnson *v.* Stone, 11 Humphrey, 419.

8 Collins *v.* Boston & Maine Railw. 10 Cush. R. 506.

1 Skinner *v.* Upshaw, 2 Ld. Raym. 752. And for advances made, for freight and storage, by other carriers. White *v.* Vann, 6 Humph. 70.

goods, this lien is waived.[2] Or if the goods be damaged, in a manner for which the carrier is liable, the owner may deduct the amount of injury from the freight.[3] But the goods must be carried, and *ready for delivery, or the carrier has no right to detain them for freight, the performance of the contract, on the part of the carrier, being a condition precedent to the right to demand freight.[4]

2. And the relation of debtor and creditor must exist between the carrier and the owner of the goods, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien.[5] Hence where one shipped goods, at Bur-

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[2] Boggs *v.* Martin, 13 B. Monroe, 243. This lien extends to all the freight upon the goods throughout their transportation, which may be advanced by the last carrier or warehouse-man. Bissel *v.* Price, 16 Ill. R. 408.

[3] Same case as n. 2. Snow *v.* Carruth, Dist. Court, U. S. Dist. of Mass., before *Sprague*, J., 19 Law Rep. 198, where the cases of Davidson *v.* Gwynne, 12 East, 380, and Sheelds *v.* Davies, 4 Camp. 119; s. c. 6 Taunt. 65, are considered, and overruled, so far as this question is concerned.

The right of the owner of the goods to insist upon any damage done the goods, for which the carrier is liable, by way of recoupment, or deduction from the freight, is well established in this country, and is a most elementary principle, as applicable to analogous cases. Bartram *v.* McKee, 1 Watts, 39; Leech *v.* Baldwin, 5 id. 446; Humphreys *v.* Reed, 6 Wharton, 435; Edwards *v.* Todd, 1 Scam. 462. But it is said the carrier is not subject to have damage done by some other party, in the transit, deducted from his lien. Bowman *v.* Hilton, 11 Ohio, 303. But it is no answer to the carrier's lien, that the goods have been damaged, during the transit, by inevitable accident, to an amount exceeding that of the lien, provided they were still of sufficient value to satisfy it. Lee *v.* Salter, Lalor's Supp. to Hill & Denio, R. 163.

And where goods were carried by a continuous line of steamboats from New York to Fitchburg, Mass., being delivered upon the pier of the steamboat company in good condition, and having been injured before their arrival at Fitchburg, to an amount exceeding the freight, it was held no defence against the claim to set off the damage to the goods against the claim for freight, at the suit of the last railway company, in the line of transportation, that the damage accrued to the goods before the goods were laden upon the boat, and without negligence on the part of the carriers. The court say the carrier, in such case, may, if he choose, make a special acceptance of the goods, as a warehouse-man, during the period between the delivery and the departure, but unless that is shown, he is liable, as carrier, from the time of the delivery for transportation. Fitchburg & Wor. Railway *v.* Hanna, 5 Gray, R.

[4] Palmer *v.* Lorilard, 16 Johns. R. 356. Opinion of *Kent*, Chancellor, and cases cited.

[5] Fitch *v.* Newberry, 1 Doug. (Mich.) R. 1. So too if the carrier detain the

lington, upon Lake Champlain, for Detroit, Michigan, care of D. by common carriers, through whom he had previously transported goods to Detroit, and paid the freight in advance; the goods coming into the possession of another line of carriers, at Troy, N. Y., without the knowledge of the owner, and being by them transported to Detroit, consigned to the care of F. who was a warehouse-man and forwarder, and who, without knowledge of the facts stated, advanced the freight due upon the goods, from Troy to Detroit, and refused to surrender them to the owner, until reimbursed the amount; in an action of replevin for the goods, it was held, that the owner was entitled to possession of the goods, without payment of the freight advanced by F.[5]

3. A common carrier, who innocently receives goods from a wrongdoer, without the consent of the owner, express or implied, has no lien upon them for their carriage, as against such owner.[6]

4. Mr. Justice *Fletcher*, in delivering the opinion of the court, in the case last cited, alludes to the fact, that so little is found in the books upon this point, and the dictum, in York *v.* Grenaugh,[7] *by Lord Chief Justice *Holt*, that in the case of the Exeter carrier, it was held that where one who stole goods delivered them to a carrier, who transported them, by his order, that the carrier thereby acquired a lien upon the goods for the freight, and that this had been adopted, by some of the elementary treatises, and by the courts even, *arguendo*, sometimes,[8] and after referring to the case of Fitch *v.* Newberry, thus continues:—

5. "This decision is supported by the case of Buskirk *v.* Purinton, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendants' vessel, on the defendants' refusal to deliver the goods to the owner, he brought trover and was allowed to recover

goods, for the payment of a sum beyond the freight, the owner being ready to pay freight, he and his agents are liable in trover, and in such case it is not requisite to make a formal tender of freight. Adams *v.* Clark, 9 Cush. R. 215; Isham *v.* Greenham, 1 Handy, Sup. Ct. Rep. 357.

6 Robinson *v.* Baker, 5 Cush. R. 137.

7 2 Lord Raym. 866, where it was held that an innkeeper might detain a horse for his keep, although put at the stable, by one who came wrongfully by him. But that case differs from a carrier, as the innkeeper cannot ordinarily demand pay in advance.

8 King *v.* Richards, 6 Wharton, 418. The court held here that the carrier might lawfully deliver the goods to the rightful owner, and defend against the claim of the bailor, or his assignee for value, on that ground.

the value, although the defendants insisted on their right of lien for the freight.

6. " In the case of Saltus *v.* Everett,[9] it is said, ' The universal and fundamental principle of our law of personal property is, that no man can be devested of his property without his consent, and consequently that even the honest purchaser, under a defective title, cannot hold against the proprietor.' There is no case to be found, or any reason, or analogy, anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently."

7. " The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him. And he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight is first paid to him, and he may in all cases secure the payment of the carriage in advance.

8. " Upon the whole the court are satisfied, that upon the adjudged cases, as well as on general principles, no right of lien for freight can grow out of a wrongful bailment of the goods to the carrier."

*9. The carrier of passengers has a lien for his charges upon the baggage, but not upon the person of the passenger.[10]

10. And neither carriers, nor warehouse-men, have any lien upon goods for a general balance of account against the owner,[11] more than in other cases of lien.

11. As we have said this lien may be waived by delivery of the goods, and the other usual modes of waiving liens, as by accepting security for the freight on time, or where by the terms of the contract of carriage, the carrier is not to receive pay, at the time of delivery of the goods.[12]

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9 20 Wend. 267, 275.

10 Story on Bailm. § 604; Wolf *v.* Summers, 2 Camp. R. 631; McDaniel *v.* Robinson, 26 Vt. R. 316.

11 Rushforth *v.* Hadfield, 6 East, 519; Hartshorn *v.* Johnson, 2 Halst. 108; Green *v.* Farmar, 4 Burr. 2214.

12 Crawshay *v.* Homfray, 4 B. & Ald. 50.

12. And where the carrier is induced to deliver the goods to the consignee, by a false and fraudulent promise of the latter that he will pay the freight, as soon as they are received, the delivery will not amount to a waiver of the lien, but the carrier may disaffirm and sue the consignee in replevin.[13]

13. In general the last carrier may detain the goods, not only till his charges, but until all the charges, during the transit are paid. If this is not settled by law, in any place, the custom and course of trade may be shown.[14] And in such case, and in all cases of lien for freight, if the goods be delivered, without exacting payment of the dues, the owner is liable to the party entitled to demand the same, whether they consist of sums due for services, or advances, for the services of other parties, made in the due course of the business.[15]

14. But the carrier, or any other bailee, having a lien, cannot sell the goods, at common law, in satisfaction of the lien. The appropriate remedy, in such case, is in equity.[16]

15. Payment of freight to a common carrier for the portion of a consignment delivered, is no presumptive evidence, either of the delivery of the remainder of the consignment, or of release from liability on that account. The consignee in such case has an option, either to set off the loss against the freight, or pay freight, and sue for the goods not delivered.[17]

16. But where the consignee declines accepting the goods, on the ground that the charges are unreasonable, or for any other cause, when the carrier is not in fault, he must still keep the goods safely, for a reasonable time at least. And where they were, under such circumstances, immediately returned to the consignor, in a remote place, it was held the carrier was liable for the damages sustained, and there being a count in trover, it is intimated, that such act amounts to a conversion.[18]

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[13] Bigelow *v.* Heaton, 6 Hill, 43; s. c. 4 Denio, 496. See also Hays *v.* Riddle, 1 Sandf. 248.

[14] Lee *v.* Salter, Lalor's Supp. to H. & Denio, 163. This lien includes all charges during the transit, of warehouse-men and forwarders. See also Cooper *v.* Kane, 19 Wend. 386; Dawson *v.* Kittle, 4 Hill, 107, as to the effect of usage.

[15] Jones *v.* Pearle, 1 Strange, 556; Pothonier *v.* Dawson, 1 Holt, N. P. C. 383; 2 Kent, Comm. 642; Hunt *v.* Haskell, 24 Maine R. 339.

[16] Fox *v.* McGregor, 11 Barb. 41; Jones *v.* Pearle, and cases *supra*, n. 14.

[17] Moore's Ex. *v.* Patterson, 28 Penn. St. R. 505.

[18] Crouch *v.* Great Western Railw. 31 Law Times, 38, s. c. 2 Hurl. & Nor. 493.

*SECTION XXIII.

TIME OF DELIVERY.

1. *Carrier must deliver goods in a reasonable time, or according to his contract.*
2. *Delay caused by unusual press of business, will not make carrier liable.*
3. *Or by the loss of a bridge, from an unusual freshet.*
4. *Carriers excused by the custom and course of the navigation.*

§ 146. 1. In the absence of a special contract, the carrier is bound to perform his duty, *i. e.* deliver the goods at their destination, or, at the end of his route, to the next carrier, in a reasonable time, according to the usual course of his business, with all convenient dispatch.[1] And, if the carrier or his servant, within the scope of his employment and duty, enter into any special contract to deliver in any particular time or place, even beyond the terminus of his particular route, it will be binding, and the owner, it would seem, may recover damages, with reference to expected profits, had the goods been delivered in time.[2]

2. But, if the carriers, being a railway company, make no special contract to deliver in any particular time, and a delay happen in the transportation, in consequence of an unusual press in business; the company having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable, under the circumstances, they are not liable for damages.[3]

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[1] Raphael *v.* Pickford, 5 M. & G. 551; Broadwell *v.* Butler, 6 McLean, R. 296. But what is reasonable time is a question of fact, depending upon the circumstances of the case. Id. Nettles *v.* S. C. Railway, 7 Rich. 190; id. 409.

[2] Wilson *v.* York, Newcastle and Berwick Railway, 18 Eng. L. & Eq. R. 557; Hughes *v.* G. W. Railway, 25 Eng. L. & Eq. R. 347. But, in Boner *v.* The Merch. Steamboat Co. 1 Jones (N. C.) 211, it is said that the obligation upon carriers by which they become insurers, does not extend to the time of delivery. Parsons *v.* Hardy, 14 Wendell, 215; Story on Bailm. 545*a*. See also upon this point, Sangamon & Morgan Railway *v.* Henry, 14 Illinois, 156; Kent *v.* Hudson River Railway, 22 Barb. 278; Lipford *v.* Charlotte & South Carolina Railway, 7 Rich. 409, and Nettles *v.* Same, id. 190; Harmony *v.* Bingham, 2 Kernan, 99; 1 Duer, 209, where it is held, that if the party enter into a contract to deliver goods, within a specified time, he cannot excuse himself, by showing delay caused by inevitable necessity.

[3] Wibert *v.* The N. Y. & Erie Railway, 19 Barb. 36; s. c. 2 Kernan, 245. In this case, it is said, the measure of damages in such cases, is not necessarily the

*3. But, where the delay in transportation happened in consequence of the loss of one of the company's bridges, by an unusual freshet, and in the mean time, the price of the goods depreciated in the market, it was held that the company were not liable, this being the act of God. It was held, that for any injury to the goods, during the delay, the company are liable.[4]

4. But the falling of the water in the Ohio River, preventing a boat passing up the falls with its cargo, was held not to come strictly within the exception to the carriers' responsibility. But proof of a long-established usage, uniform and well known, to allow boats, in such cases, to wait, a month or more, for the rise of water, without incurring liability for not delivering their cargo in a reasonable time, under the usual bill of lading, with "the privilege of reshipment," is admissible. And it was held, that such delay did not deprive the owner of the right to recover full freight.[5]

SECTION XXIV.

CARRIERS HAVE AN INSURABLE INTEREST IN THE GOODS.

§ 147. As carriers become insurers of all goods, which they carry, against fire, or marine disaster, except from inevitable accident, there can be no doubt they have, to that extent, an insurable interest in the goods, and it has been so held.[1] And this insurable interest continues, so long as the liability of the carrier continues, even where they employ other carriers.[1]

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difference in prices, at the time it should have been delivered, and that at which it was delivered.

[4] Lipford *v.* The S. C. Railway, 7 Rich. 409. But see *ante*, § 142, n. 4. See also The May Queen, Newberry's Adm. R. 464.

[5] Broadwell *v.* Butler, 6 McLean, R. 296.

[1] Chase *v.* Washington Mutual Insurance Company of Cincinnati, 12 Barb. 595. But the carrier has the right, by express contract, to except risks from fire, or any other cause, from his undertaking, and in such case he is not liable for loss, by the excepted risk. Parsons *v.* Montroth, 13 Barb. 353. But upon general principles the first carrier is liable for loss by fire, while the goods are in a float, changing to the next carrier. Miller *v.* Steam Nav. Co. 13 Barb. 361.

*SECTION XXV.

RULE OF DAMAGES, AND OTHER INCIDENTS OF ACTIONS AGAINST CARRIERS.

1. *Damages, for total loss, are the value of the goods at the place of destination.*
2. *Goods only damaged, owner bound to receive them, and the amount of damage.*
3. *Upon evidence of servants' unfaithfulness or negligence, some explanation must be given, or the company held liable.*
4. *Company liable, for special damages, where they act* malâ fide.
5. *But not ordinarily liable for special damage.*
6. *Consignor owning the goods the proper party to sue.*
7. *Consignor in such case not estopped, by the act of consignee.*
8. *Actions may be brought in the name of bailee, or agent.*
9. *Recovery in such cases bars the claim of general owner.*
10. *Where general property in consignee, he should sue.*
11. *Preponderating evidence must be given.*

§ 148. 1. The general rule of damages, in actions against carriers, where the goods are lost, or destroyed, by any casualty, within the range of the carrier's responsibility, is sufficiently obvious. It must be the value of the goods, at the place of destination.[1] And this will commonly include the profits of the adventure.[2] In a well-considered English case,[3] Lord *Tenterden*, Ch. J., thus lays down the rule: "The damages ought to be the value of the cargo, at the time when it ought to have been delivered, that is, at the port of discharge." *Parke*, J., said, "The sum it would have fetched, at that time, is the amount of loss sustained by the non-performance of the defendants' contract."

2. But where the goods are only damaged, the owner is still bound to receive them, and cannot abandon, and go against the carrier as for total loss.[4] But whether the owner have accepted

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[1] Hand *v.* Baynes, 4 Wharton, 204. *Ante*, § 146, n. 2; Grieff *v.* Switzer, 11 Louis. An. 324.

[2] Sedgwick on Dam. 356.

[3] Brandt *v.* Bowlby, 2 B. & Ad. 932. See also Gillingham *v.* Dempsey, 12 S. & R. 183; Ringgold *v.* Haven, 1 Cal. R. 108. Trover will not lie against the carrier, or any other bailee, for mere neglect of duty. There must be an actual conversion, or a refusal to deliver, on proper request. Bowlin *v.* Nye, 10 Cush. 416; Opinion of court in Rome Railway *v.* Sullivan, 14 Ga. 283; Robinson *v.* Austin, 2 Gray, 564.

[4] Shaw *v.* South Carolina Railway, 5 Rich. 462. So also where not delivered in a reasonable time, the owner can only recover damage of the carrier. Scoville *v.* Griffith, 2 Kernan, 509.

*the goods, or not, he may recover for any deterioration they have sustained, unless by the excepted risks in the carrier's undertaking.[5]

3. In an action against a carrier, slight evidence having been given, that the porter of the carrier stole the goods, and the jury having found for the plaintiff, a new trial was denied, on the ground that the carrier did not offer the porter as a witness.[6] And in an action against a railway for negligence, if the plaintiff show damage, resulting from an act of defendants, he makes a *primâ facie* case, and the defendant must show that he was in the exercise of the requisite degree of care, or else that such a state of circumstances existed, as rendered all exercise of care unavailing, and this is so although the act complained of is one, which, with proper care, does not ordinarily produce damage.[7]

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[5] Bowman *v.* Teall, 23 Wendell, R. 306.

[6] Boyce *v.* Chapman, 2 Bing. N. C. 222. And upon general principles the plaintiff makes a *primâ facie* case, by showing that the goods did not reach their destination. Story on Bailm. § 529*a*; Woodbury *v.* Frink, 14 Ill. 279; Bennett *v.* Filyaw, 1 Florida, R. 403; Bark Oregon, Newberry's Adm. R. 504; Brig May Queen, id. 464. But where the carrier has, by notice, or special contract, limited his responsibility, as a common carrier, the burden of proof of showing negligence is upon the consignee, the same as in ordinary suits, charging neglect of duty. Id. But where the bill of lading states the goods to have been shipped in good order, and they arrived in a damaged state, the burden of proof is upon the carrier, to show, that the damage occurred by causes, for which by the bill of lading he was not responsible. The Propeller Cleveland, id. 221. And where, in such case, the carrier shows the existence of facts, from which this could be fairly inferred, it devolves upon the shipper to show, that the damage might have been prevented by the exercise of ordinary care and skill, on the part of the carrier. Id.

And where the carrier at first wrongfully refused to deliver goods consigned to a manufacturer, but afterwards delivered them, it was held, that he was not liable for consequential damages, from the delay of the consignee's works, or the consequent loss of profits, but only for the expense of sending a second time for the goods. Waite *v.* Gilbert, 10 Cush. 177. Perhaps the manufacturer was entitled to some consideration, by way of damages, until he could have supplied himself, in other ways, with similar materials, if indispensable for his present use. But to recover such special damages, which are not the natural, or ordinary result of the act complained of, it is probably necessary, in strictness, to declare specially. But in a late case in the Court of Exchequer, for not carrying a passenger according to the carrier's duty and contract, it was held that no such remote and accidental damages are recoverable, in any form. Hamlin *v.* Great Northern Railw. 38 Eng. L. & Eq. 335. See *post*, § 156, n. 2.

[7] Ellis *v.* Portsmouth & Raleigh Railway, 2 Iredell, 138.

4. In a late English case,[8] it is held, that if a railway company omit to deliver bundles of packed parcels, in time, with a view to injure the plaintiff's business, as a collector of parcels, and thereby * create a monopoly in themselves, they will be liable to the special damage resulting therefrom, but not otherwise.

5. Where a plan and models sent to compete for a prize were lost, by the carriers, it was held, the proper measure of damages is the value of the labor and materials expended in making the articles, and not damages, from losing the chance of obtaining the prize; the latter being too remote.[9]

6. The consignor, who owns the goods, and sustains the injury from the damage or loss, is the proper party to bring the action against the carrier.[10]

7. A receipt for the goods, by the consignee, acknowledging to have received them in good order, and in which he is requested to notice any errors therein, in twenty-four hours, or the carrier will consider himself discharged, does not estop the consignor, in such case, from suing the carrier, for damage of the goods, although no notice thereof was given the carrier.[10]

8. Actions against carriers may be brought in the name of bailees, or agents, who have the rightful custody of the goods, and who make the bailment, or in the name of the owner.[11]

9. But it is well settled, that a recovery for the goods, of the first, or any subsequent carrier, in the name of any one having either a general or special property in the goods, in an action properly instituted, will be a bar to any subsequent suit, against the same person, at the suit of another party, having either a general, or special property in the goods.[12]

10. Where the general property in the goods vests in the consignee, upon delivery to the carrier, the consignor has ordinarily no property remaining, even where he pays the freight.[13]

11. In the trial of actions against carriers, where the goods, or

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8 Croueh *v.* Great Northern Railway, 25 Law Jour. R. 137.

9 Lythgoe *v.* East Anglian Railway, 15 Jurist, 400.

10 Sanford *v.* Housatonic Railway, 11 Cush. R. 155.

11 Elkins *v.* Boston & Maine Railway, 19 N. H. R. 337; White *v.* Bascom, 28 Vt. R. 268.

12 White *v.* Baseom, 28 Vt. R. 268; Green *v.* Clark, 13 Barb. 57; s. c. 2 Kernan, 343.

13 Green *v.* Clark, *supra.*

baggage, pass over successive lines of transportation, it has been held insufficient evidence, to charge the first carrier to show the delivery of the goods to him, and the failure of their arrival, at the place of destination, thus leaving the case without any preponderating evidence, to show that they were not delivered to the second carrier.[14]

*CHAPTER XVII.

COMMON CARRIERS OF PASSENGERS.

SECTION I.

DEGREE OF CARE REQUIRED.

1. *Are responsible for the utmost care and watchfulness.*
2. *Duty extends to every thing connected with the transportation.*
3. *But will not extend to an insurance of safety.*
4. *Will make no difference, if passenger does not pay fare.*
5. *So too where the train is hired for an excursion, or is under control of state officers.*

§ 149. 1. It is agreed on all hands that carriers of passengers are only liable for negligence, either proximate or remote, and that they are not insurers of the safety of their passengers, as they are, as common carriers of goods, and of the baggage of passengers. The rule is clearly laid down in one of the early cases,[1] by *Eyre*, Ch. J.: that carriers of passengers "are not liable for injuries happening to passengers, from unforeseen accident or misfortune, where there has been *no* negligence or default in the driver." "It is said he was driving with reins so loose, that he could not readily command his horses; if that was the case, the defendants are liable; for a driver is answerable for the *smallest negligence*." This is now the settled rule upon the subject, as applicable to all modes of carrying passengers, by those

[14] Midland Railway *v.* Bromley, 33 Eng. L. & Eq. R. 285.

[1] Aston *v.* Heaven, 2 Esp. R. 533; Frink *v.* Potter, 17 Illinois R. 496.

who hold themselves out as public or common carriers of passengers.[2]

2. And the obligation of care and watchfulness extends to all the apparatus by which passengers are conveyed.[3] In this last *case it is said: "The obligation of a stage proprietor, in regard to carrying passengers safely, has reference to the team, the load, the state of the road, as well as the manner of driving." In another case the rule is somewhat more elaborated,[4] by *Best*, Ch. J.: "The action cannot be maintained unless negligence be proved, and whether it be proved is for the determination of the jury. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. *If there be the least failure in any one of these things*, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury, or damage, that happens." The rule of care and diligence thus laid down has been very generally adopted in this country.[5]

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[2] Christie *v.* Greggs, 2 Camp. R. 79; Harris *v.* Costar, 1 C. & P. 636; White *v.* Boulton, Peake's C. 81; Sharp *v.* Grey, 9 Bing. R. 457.

[3] Taylor *v.* Day, 16 Vt. R. 566; Curtis *v.* Drinkwater, 2 B. & Ad. 169.

[4] Crofts *v.* Waterhouse, 3 Bing. R. 319. A very similar rule is adopted in Farrish *v.* Reigle, 11 Gratt. 697. The defect in this case was the blocks being out of the brakes, which caused the coach to press upon the horses so that they could not control it, and in consequence it was upset, and the plaintiff injured.

The coach-owner, or his servants, must examine his coach before each trip, or he is chargeable with negligence, if any accident happen through defect of the coach. And if any irregularity is pointed out, the driver must look to it immediately. Brenner *v.* Williams, 1 C. & P. 414, *Best*, Ch. J.

[5] Boyce *v.* Anderson, 2 Pet. Sup. Ct. R. 150; Stokes *v.* Saltonstall, 13 Pet. U. S. R. 181, 192; Fuller *v.* Naugatuck Railway, 21 Conn. R. 557; Hall *v.* Conn. Riv. Steamboat Co. 13 Conn. R. 319; Camden & Amboy Railway *v.* Burke, 13 Wend. 611, 626; McKinney *v.* Neil, 1 McLean, 540; Maury *v.* Talmadge, 2 McLean, 157; Stockton *v.* Frey, 4 Gill, R. 406; Hollister *v.* Nowlen, 19 Wend. R. 236; Derwort *v.* Loomer, 21 Conn. 245.

The rule in Connecticut was first settled, in 13 Conn. 326, that carriers of passengers are "bound to the highest degree of care that a reasonable man would use." This has been adhered to, in all the subsequent cases, and is substantially the same as the English rule, and as that adopted in the other states, and in the United States Supreme Court, 13 Pet. Sup. Ct. R. 190, where Mr. Justice *Barbour* indorses the charge of the Circuit Court, that the carrier of passengers is liable "if the disaster was occasioned by the least negligence, or want of skill, or prudence, on his part."

* The fact that injury was suffered by any one, while upon the

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But in the case of Boyce *v.* Anderson, 2 Pet. 150, Mr. Ch. Justice *Marshall* lays down the rule of care, in such cases, as that of ordinary care,—the care which all bailees for hire owe the employer. The court, in 13 Pet. R. 192, attempt to escape from this rule, upon the ground that the remarks of Ch. Justice *Marshall*, in the former case, had reference exclusively to the carriage of slaves, and that the rule laid down would not of necessity apply to ordinary passengers. But it is observable that the learned chief justice makes no such distinction, and also, that the nearer the thing transported comes to the condition of property merely, the higher the degree of care and responsibility, so that the argument seems not only to fail, but to produce a reflex influence.

We refer to this subject here, not with any view to go into the question of the real coincidence of the degree of care of carriers of passengers and that of ordinary bailees for hire, but merely to state, that it seems to us the cases really come up to nothing more, than that which is required of every bailee for hire, that he should conduct the business, as prudent men would be expected to conduct their own business of equal importance. And if the business be of the highest moment, then the care, skill, and diligence should be also of the most extreme character. We here refer to the case of Briggs *v.* Taylor, 28 Vt. R. 180, 184, for a more full exposition of this subject.

If the degree of care and watchfulness is to be in proportion to the importance of the business, and the degree of peril incurred, it is scarcely possible to express the extreme severity of care and diligence, which should be required in the conduct of passenger trains upon railways. Hence very few cases of accident and injury have occurred, where it was not considered, in some measure, attributable to a want of the requisite degree of care.

But see Hood *v.* N. Y. & N. H. Railway, 22 Conn. R. 1, 15; Galena & Ch. Railway *v.* Yarwood, 15 Ill. R. 468; 14 How. U. S. Sup. Ct. R. 468; Railroad Co. *v.* Aspell, 23 Penn. R. 147, 149; N. J. Railway Co. *v.* Kennard, 21 Penn. R. 203; McElroy *v.* Nashua & Lowell Railway Co. 4 Cush. 400; 16 Barb. 356.

In Caldwell *v.* Murphy, 1 Duer, 241, the court say: "The charge of the judge, that the law exacted from a carrier of passengers extraordinary care and diligence, and that they are liable, unless the injury arises from force or pure accident, was entirely correct." And in Ingalls *v.* Bills, 9 Met. 1, the same rule is adopted. The injury here occurred from the breaking of the axletree of the coach, through a flaw in the iron not visible upon the outside, and the defendant had been at great care and expense, in procuring a coach of the best materials and workmanship, as he supposed; and the court say, that carriers of passengers are "bound to use the *utmost care and diligence* in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries, which human care and foresight can guard against; and if accident happens through defect in the coach, which might have been discovered and remedied, upon the most thorough and careful examination of the coach, the owner is liable. But if the injury arise from some invisible defect, which no ordinary test will disclose, like that in the present case, the carrier is not liable." Frink *v.* Potter, 17 Ill. R. 406; Galena & Chicago Railway *v.* Fay, 16 Ill. R. 558. See also Wilkie *v.* Bolster, 3 E. D. Smith, 327.

*company's trains as a passenger, is regarded as *primâ facie* evidence of their liability.[6]

Slaves are to be regarded as passengers, and carriers only liable, for negligence, in carrying them. McClenagan *v.* Brock, 5 Rich. 17.

But a railway company, who take on their trains a slave, and transport him for the usual fare for negroes, such slave, having only a general pass, or permit, when the law of the state requires such permit to specify the length of time the slave is to be absent, and the places he is to visit, this being done, without the knowledge of the owner of the slave, are liable for a conversion of the slave, and for all the injuries received, by such slave, in consequence of such transportation, whether occurring from the negligence of the company, or not. Macon & Western Railway *v.* Holt, 8 Georgia, 157. See also upon the general subject of this note, Black *v.* Carrollton Railway, 10 Louis. Ann. R. 33.

[6] *Denman*, Ch. J., at *Nisi Prius*, in Carpue *v.* London & B. Railway, 5 Q. B. 747. Laing *v.* Colder, 8 Penn. 483; Galena & Ch. Railway *v.* Yarwood, 15 Ill. 471; Hegeman *v.* The Western Railway, 16 Barb. 356; Holbrook *v.* The Utica & Schen. Railway, 16 Barb. 113; 20 Barb. 282.

The same rule had obtained in actions against carriers of passengers by coaches. 13 Pet. Sup. Ct. R. 181. See Skinner *v.* L. B. & South Coast Railway, 2 Eng. L. & Eq. R. 360, to same effect.

But in Holbrook & Wife *v.* Utica & Schen. Railway, 2 Kernan, 236, the court seem to deny that a presumption of negligence arises in all cases of injury to passengers. In this case the wife's arm, while in the window of the car, was broken, by something coming in contact with the car, in passing stationary cars of the company, on another track. The court say, in cases of this kind, the burden of showing negligence is upon plaintiff, and the presumption is an inference of fact for the jury, from the cause of the injury and the circumstances attending.

The case of Hegeman *v.* The Western Railway, 16 Barb. 353, was where the plaintiff had sustained an injury, by the breaking of an axletree, while he was a passenger in defendant's cars, and it was claimed to be neglect in the company, in not providing safety-beams to their cars, and it was held, that evidence might be received, to show the utility of the invention, and that it was proper to submit the question of negligence to the jury, under proper instructions. The court say: "Whether the engine or car, which is placed upon the road, for the purpose of carrying passengers, has been manufactured at its own shops," . . . or purchased of other manufacturers, "the company is alike bound to see, that in the construction, no care or skill has been omitted, for the purpose of making such engine, or car, as safe as care and skill can make it." It was held to afford no presumption against the negligence of the company, that they had selected their servants with care, with reference to their competency, or that the act, by which the plaintiff sustained injury, was done without the sanction of the company. Gillenwater *v.* The Madison & Indianapolis Railway, 5 Ind. R. 340; Farrish *v.* Reigle, 11 Grat. 697.

In Galena & Chicago Railway *v.* Yarwood, 17 Ill. R. 509; s. c. 15 Ill. R. 468, it is held, that a passenger in a railway car need only show that he has received

*3. So, too, evidence that the cars did not stop at a way station, the usual time, and that a passenger is injured in getting

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an injury, to make a *primâ facie* case against the carrier; the carrier must rebut the presumption, in order to exonerate himself. Negligence is a question of fact, which the jury must pass upon. Persons in positions of great peril are not required to exercise all the presence of mind, and care, of a prudent, careful man, under ordinary circumstances; the law makes allowance for them, and leaves the circumstances of their conduct to the jury. See Albright *v.* Penn, 14 Texas R. 290.

In Frink *v.* Potter, 17 Ill. R. 406, it was held, the proprietor of a stage-coach is liable for an injury to a passenger, which resulted from the breaking of an axle-tree, by the effect of frost. If the carrier knew, or might have known, by the exercise of extraordinary care and attention, that danger would result from using a coach in the manner and under the circumstances, and the danger could have been avoided, he is liable.

And if such danger exists, as cannot be avoided, and so imminent as to deter prudent men from encountering it, in their own business, the carrier should, it would seem, refuse to proceed, or he will be liable for the consequences. Passengers should not be pushed into inevitable danger, without being consulted. But if, being informed, they choose to incur the hazard, probably it should be regarded, as their own misfortune, if they suffer damage, in spite of the best efforts of the carrier and his servants.

In Laing *v.* Colder, 8 Penn. 483, it was held, that where passengers in a railway car are liable to have their arms caught, in passing bridges, if lying out the windows, it is the duty of the conductors of the train to give such notice to them, as will put them effectually on their guard, or the company are liable for all such injuries, and that it is not sufficient to trust to printed notices put up in the cars. But in regard to such perils as ordinarily attend railway travelling, and which must be apparent to all passengers of common experience, like passing from car to car, or standing upon the platforms, when the train is in motion, it is probable that general notice would be sufficient, and a passenger, who voluntarily exposes himself to extraordinary peril, having no necessity or excuse for doing so, should not be allowed to recover for damage thereby accruing. But if he have a necessity for doing so, and damage accrue, in consequence of the negligent conduct of the train, he ought not perhaps to be precluded from a recovery.

See also Christie *v.* Griggs, 2 Camp. 79; Ware *v.* Gay, 11 Pick. 106; Stockton *v.* Frey, 4 Gill, 406; Nashville & Chat. Railway *v.* Messino, 1 Sneed, 221.

In 3 Kernan, 9, the case of Hegeman *v.* The Western Railway, is affirmed by the Court of Appeals, and the proposition in regard to the liability of the company for defects in their cars, being the same, whether they manufacture them, or purchase them of others, which is extracted from the opinion of the Supreme Court above, is distinctly reaffirmed by the Court of Appeals. *Denio*, J., dissenting.

The Court of Appeals recognize the rule of care and diligence, to which we have before alluded, that its extent is to be measured by the known perils to which passengers are exposed, and that something more is required in railway transportation than in carrying passengers by coaches.

out, is good *evidence against the company, in an action to recover for the injury.[7] In an action for damages sustained by a passenger on a railway, by the breaking down of a bridge, it is no excuse, that the bridge was built by a competent engineer.[8] But it seems to have been doubted by the court, in this case, whether the company could have been chargeable with any fault, if they had adopted the best mode of constructing the bridge, and the best materials, under the supervision of a competent engineer. This seems to be stating a case where the bridge could not have fallen, but by an earthquake, or some convulsion of nature, for which the company are in no sense liable.

4. The liabilities of the company attach, although the passenger were riding upon a free ticket, as a newspaper reporter.[9] But

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Gardiner, Ch. J., says: "That although the defect was latent, and could not be discovered by the most vigilant external examination, yet if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter is responsible."

And in Curtis *v.* Rochester & Sy. Railway, 20 Barb. 282, where the injury occurred from a misplacement of the rails, a collision being caused thereby, it was held the company were bound to see that the rails were in the right position, and not to trust exclusively to the lever of the switch, when the rails were in open view, while moving it, and also to see that the rails were firmly secured, and for want of these things, they were guilty of negligence; that evidence that the switch was placed right, did not rebut all presumption of negligence; that it was a question for the jury, under all the facts and circumstances.

So also the company were held liable where the injury occurred from coming in contact with an animal upon the track, which might have been seen early enough to stop the train, and where the train was moving at an unreasonable rate of speed, and no signal given, or effort made to arrest the speed. N. & C. Railway *v.* Messino, 1 Sneed, 220.

[7] Fuller & Wife *v.* The Naugatuck Railway, 21 Conn. 557.

[8] Grote *v.* The Chester & Holyhead Railway, 2 Exch. 251.

[9] Hodges on Railway, 621; Great N. Railway *v.* Harrison, 26 Eng. L. & Eq. R. 443; Gillenwater *v.* Mad. & I. Railway, 5 Ind. R. 340. And in Nolton *v.* The Western Railway, 15 N. Y. Court of Appeals, 444, it is held that where a railway voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, if such passenger be injured by the culpable negligence or want of skill of the agents of the company, they are liable, in the absence of an express contract exempting them. The point of the degree of care requisite in such cases is here discussed, but not decided. But the argument is in favor of that for which we contend, that the care, diligence, and skill required, in any particular business, is determined by the difficulty and peril of the business, rather than by the consideration of the undertaking. This is the same case of a mail agent, who was carried, as an accessory of the mail, referred to on p. 620. And, although

it has been sometimes claimed to admit of some question, whether such passengers could always exact the same degree of care and watchfulness, as one who paid fare, especially where his ticket, as is not unusual, in such cases, contained a notice, that passengers, who used such ticket, rode at their own risk, and the company would not be responsible for the safety of such passengers, or their baggage. But the subject is very much discussed in one very important case,[10] in the national tribunal of last resort, where the plaintiff, being president of another railway, was at the time riding by invitation of the president of defendants' road, in a special train, *for the accommodation of the officers of the road, and without charge. The collision occurred by another engine and tender, coming in the opposite direction, upon the same track, in disobedience of orders to keep the track clear. *Grier*, J., said: "The confidence induced, by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. Where carriers undertake to carry persons, by the powerful but dangerous agent of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary, or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the

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the court seem to regard it as a case of gratuitous transportation, it seems to us it should not so be considered. We should certainly hold it a carrying for compensation, by the contract, although nothing in particular was paid for the fare of the agent as such.

[10] Derby *v.* Phil. & Read. Railway, 14 How. 483. The principle of this case has been followed out, in an elaborate opinion of Mr. Justice *Curtis*, Steamboat New World *v.* King, 16 How. U. S. R. 469, 474, where the old theory of different degrees of negligence, defined by the terms, slight, ordinary, and gross, is examined and dissented from. The true theory seems to be, that it makes no difference, whether a service is performed gratuitously, or not, in regard to the obligation to perform it well, after it is once entered upon. But it depends chiefly upon the circumstances of the case, and the undertaking of the party. If one is permitted to ride in the company's carriages, as a passenger, he is certainly entitled to demand, and to expect, the same immunity from peril, whether he pay for his seat, or not. The undertaking to carry safely is upon sufficient consideration, if once entered upon, as was held in the familiar case of Coggs *v.* Bernard, Holt, R. 13.

But if the party should obtain consent to ride in some unusual mode, for his own special accommodation, he is then only entitled to expect such security as the mode of conveyance might reasonably be expected to afford.

negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross."

5. Hiring a train for an excursion does not excuse the company from liability to the passengers for injuries caused by their servants.[11] Or if the train is under the control of state officers, it will not exonerate the company, or a natural person, if they continue to act as passenger carriers under the state.[12]

SECTION II.

LIABILITY, WHERE BOTH PARTIES ARE IN FAULT.

1. *Company not liable unless in fault.*
2. *Not liable where plaintiff's fault contributes directly to injury.*
3. *Company liable, for wilful misconduct, or such as plaintiff could not avoid.*
4. *Plaintiff may recover for gross neglect of company, although in fault himself.*
5. *But not where he knew his neglect would expose him to injury.*
6. *May recover although riding in baggage car.*
7. *Company do not owe such duty to wrong-doers.*
8. *May recover although out of his place on the train.*
9. *Plaintiff affected by negligence of those who carry him.*
10. *Fault on one part will not excuse the other, if he can avoid committing the injury.*
11. *Negligence to be determined by the jury, where evidence conflicts.*
12. *Plaintiff must be lawfully in the place, where injured.*
13. *Passengers bound to conform to regulations of company, and directions of conductors.*

§ 150. 1. To the liability of a railway company, as passenger carriers, two things are requisite—that the company shall be guilty of some negligence which mediately or immediately, produced or enhanced the injury—and that the passenger should not *have been guilty of any want of ordinary care and prudence which directly contributed to the injury; since no one can recover for an injury, of which his own negligence was in whole, or in part, the proximate cause.[1]

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[11] Skinner *v.* L. B. & S. Railway, 2 Eng. L. & Eq. R. 360.

[12] Peters *v.* Rylands, 20 Penn. 497.

[1] Robinson *v.* Cone, 22 Vt. R. 213; Butterfield *v.* Forrester, 11 East, 60; Simpson *v.* Hand, 6 Wharton, 311; Rathbun *v.* Payne, 19 Wend. 399; Barnes *v.* Cole, 21 id. 188; Hartfield *v.* Roper, id. 615.

In this last case, the rule was carried to its extreme verge in denying the recovery, and seems at variance with the more recent cases upon the subject. See Robinson *v.* Cone, 22 Vt. 213; and Lynch *v.* Nurdin, *infra;* also, Birge *v.* Gardiner, 19 Conn. R. 507; Collins *v.* Albany and Sch. Railway, 12 Barb. 492. In

2. But one is only required to exercise such care as prudent persons, under his particular circumstances, might reasonably be expected to exercise. Hence, a very young child, or perhaps one deprived of some of the senses, or who was laboring under mental alienation, or a very timid or feeble person, would not be precluded from recovering for the negligence of others, when persons of more strength, or courage, or capacity, might have escaped its consequences.[2]

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the late case of Martin *v.* The Great N. Railway, 30 Eng. L. & Eq. R. 473, a query is made whether, if a passenger is hurt in a station of a railway company, after being booked as a passenger, and while going to the train, through the defective lighting of the station, he is precluded from a recovery by reason of his own negligence having contributed to the injury, a distinction being attempted between negligence which is a violation of contract, and that which is only a violation of the general duty to use your own so as not needlessly to injure others.

We allude to this, not as having marked out any intelligible ground of distinction, but as another indication of a disposition to restrain the universal application of the former rule, that the slightest possible negligence, on the part of the plaintiff will, in all cases, prevent a recovery.

See also Spencer *v.* Utica and Sch. Railway, 5 Barb. 337; Brand *v.* Troy and Sch. Railway, 8 Barb. 368; Richardson *v.* The Wil. & R. Railway, 8 Rich. 120. This was an action in favor of the master for killing his slave while asleep upon the track of the railway. The court held, that the negligence of the slave would prevent the recovery. Galena & Ch. Railway *v.* Fay, 16 Illinois R. 548.

[2] Robinson *v.* Cone, 22 Vt. R. 213; Lynch *v.* Nurdin, 1 Ad. & El. (N. S.) 29. In this case, *Denman*, C. J., says, "Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation." Beers *v.* The Housatonic Railway, 19 Conn. 566; Neal *v.* Gillett, 23 Conn. 437. In a recent trial in Connecticut, before Mr. Justice *Seymour* of the Superior Court, a case of some interest was submitted to a jury. The facts were, that the plaintiff, a child two years old, who sued by guardian, while on the track of the Norwich and Worcester Railway, was run over by a train, and had a leg and hand amputated in consequence. The learned judge left the question of negligence, in both parties, to the jury, saying, he did not think negligence could fairly be imputed to so young a child, and that the negligence of the parents, if any, would not hinder plaintiff's recovery, if the defendants, after discovering the plaintiff on the track, might have prevented the injury, which is certainly the more common test of liability in similar cases. The jury gave the plaintiff a verdict for $1,800. But the case will doubtless go before the full bench, and there may be other questions involved. Daley *v.* Norwich & Worcester Railw. 9 Am. Railw. Times, No. 50.

In Oldfield *v.* N. Y. & Harlaem Railw. 3 E. D. Smith, 103, it is held, that negligence is not to be presumed, as matter of law, from a child, six or seven years of age, being unattended in the streets of a city. Whether permission to the child

And, although the plaintiff's misconduct may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and with the exercise of prudence he might have prevented it, he is not excused.[3]

3. So, too, where there is intentional wrong on the part of the *defendant, he is liable notwithstanding negligence on the part of the plaintiff.[4] And, if the defendant is guilty of a degree of negligence from which the plaintiff, with the exercise of ordinary care, cannot escape, he may recover, although there was want of prudence on his part.[5]

4. And, in many cases, the plaintiff has been allowed to recover for the gross negligence of the defendant, notwithstanding he was, at the time, a trespasser upon the defendant's rights.[6]

5. But in all cases where both parties are in fault, and the plaintiff's fault was upon a point which he knew, or had reason

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to go into the streets, in that way, is negligence, is for the jury to determine, from the circumstances of each case.

[3] Davis *v.* Mann, 10 M. & W. 564; Illidge *v.* Goodwin, 5 C. & P. 190.

[4] Brownell *v.* Flagler, 5 Hill, (N. Y.) R. 282. This is the case of a drover knowingly driving off a lamb which had strayed into his drove, and he was held liable, although the plaintiff was first in fault, and defendant, in selling his drove, did not take pay for this lamb.

[5] Bridge *v.* Grand Junction Railway, 3 M. & W. 244. In a late case in Georgia, Macon and W. Railway *v.* Davis, 18 Georgia R. 679, 686, the rule of law here adverted to is approved by a judge of large experience and reputation. "We approve of modification of the principle, and think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendant could not, in the exercise of reasonable diligence, have prevented the collision." So also in Runyon *v.* Central Railway, 1 Dutcher, 556.

But where the plaintiff's conduct is reckless and rash, he cannot recover if such negligence contributed to the injury, and the defendant acted in good faith. Sheffield *v.* Roch. and Sy. Railway, 21 Barb. 339; Galena and Chicago Railway *v.* Fay, 16 Illinois R. 558. See also Center *v.* Finney, 17 Barb. 94; Moore *v.* Central Railway, 4 Zab. 268, 824.

And in Macon & W. Railway *v.* Wynn, 19 Ga. R. 440, it is held, that if, notwithstanding the negligence of defendant, the plaintiff, in the exercise of common care and prudence, might have avoided the injury, he cannot recover. And the general proposition, held in the same Company *v.* Davis, *supra*, is reaffirmed in the Central Railway and Banking Co. *v.* Davis, 19 Ga. R. 437.

[6] Birge *v.* Gardiner, 19 Conn. R. 507; Bird *v.* Holbrook, 4 Bing. 628. This is the case of spring guns set in the defendant's grounds without plaintiff's suspecting it. See also Ilott *v.* Wilkes, 3 B. & Ald. 304, where the plaintiff had reason to suspect the danger, and might, by the exercise of prudence, have escaped it, and he failed to recover. Cotterill *v.* Starkey, 8 C. & P. 691.

to believe, would or might contribute to the injury, he cannot recover, and the rule laid down by Lord *Ellenborough*, Ch. J., in Butterfield *v.* Forrester, applies to the great majority [1] of cases involving this inquiry: "One person being in fault will not dispense with another using ordinary care for himself. Two things must concur to support this action,—an obstruction in the road, by the default of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff."

6. One being in the baggage car, with the knowledge of the * conductor, will not preclude him from a recovery for an injury caused by a collision, even though he might, or would not have been injured if he had remained in the passenger car.[7]

7. And where the locomotive of a railway ran across the legs of a person while walking upon their track in the streets of a city, it was held that the party could not recover if his own negligence contributed to the injury; and that a railway is not bound to the same degree of care in regard to mere strangers who may voluntarily, but unlawfully, go upon their track, which they owe to passengers conveyed by them.[8]

8. It was held that a passenger who, having live-stock upon the train of freight cars, was by the regulations of the company required to remain upon the cars that contained his stock, was not precluded from recovering for an injury by collision with another train by reason of his being, at the time, in another part of the train.[9]

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[7] Carroll *v.* N. Y. and N. H. Railway, 1 Duer, 571. The court here say,—"he was under no obligation to be more prudent and careful than he was, in contemplation of there possibly being such highly culpable conduct on their part." But where, by the general regulations of the company, its engineers were prohibited from allowing any one, not in its employ, to ride upon the engine, and the plaintiff was permitted to ride upon the engine by the engineer, without paying fare, after he had been informed of the company's regulations upon the subject, and sustained an injury while so riding, it was held that he was a wrongdoer and could not recover, the consent of the engineer conferring no legal right. It was also said, that the *onus* of showing the authority of the engineer was upon the plaintiff, the presumption being, that the plaintiff had no right to ride upon the engine, whether he paid fare or not. Robertson *v.* New York and Erie Railway, 22 Barb. 91.

[8] Brand *v.* Troy and Sch. Railway, 8 Barb. 368. The latter proposition, stated in the text, in reference to this case, seems to us highly reasonable and just.

[9] The Penn. Railroad *v.* McCloskey, 23 Penn. R. 532. In this case, it is said

9. And it seems that the negligence of those who carry the plaintiff, contributing to the injury, will preclude his recovery as much as if it were his own act.[10] But the negligence must be of a character directly and naturally to contribute to the injury, it would seem, in either case.[10]

*10. One party being in fault will not excuse the other party, if, by the exercise of ordinary care, he might still have avoided the injury, notwithstanding the fault of the first party.[11]

11. And what is proper care will be often a question of law, where there is no controversy about the facts.[12] But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.[13]

12. It has been held that a passenger in a railway car is not bound, in order to entitle himself to an indemnity against the negligence of the company, to select his seat so as to incur the least hazard.[14] All that is requisite in such case is that the plaintiff should, at the time, have been where it was lawful for him to be.[14]

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a passenger is not in fault in obeying the specific instructions of the conductor, although in conflict with the general regulations of the company known to him.

[10] Thoroughgood *v.* Bryan, 8 C. B. 115; Catlin *v.* Hills, id. 123. But in a late case in the Superior Court of the city of New York, this rule is not followed. Colegrove *v.* Harlaem, & N. Y. & N. H. Railways, Law Reporter, July, 1857, 156. This case is certainly opposed to principle upon this point, and also upon the question of the joinder of the two companies in one action. But the latter difficulty may be obviated by their Code of Practice.

[11] Trow *v.* Vermont C. R. 24 Vt. R. 487; 13 Ga. 86.

[12] Trow *v.* Vt. C. R. 24 Vt. R. 487; Henning *v.* N. Y. & Erie Railw. 13 Barb. 9.

[13] Quimby *v.* Vermont C. R. 23 Vt. R. 387; Briggs *v.* Taylor, 28 Vt. R. 180; Patterson *v.* Wallace, in the House of Lords, 1853, 28 Eng. L. & Eq. R. 48. Here the judgment of the court below was reversed, although there was no controversy about the facts, but only as to whether a certain result was to be attributed to negligence on one side, or rashness upon the other, the judge having withdrawn the case from the jury, in the court below, it was held, in the House of Lords, to be a pure question of fact for the jury. See Taff Vale Railw. *v.* Giles, 22 Eng. L. & Eq. R. 202; N. Y. & Erie Railway *v.* Skinner, 21 Penn. R. 298. In Murray *v.* Railway Company, 10 Rich. (S. C.) R. 227, it was held, that it was the duty of a railway company to slacken speed at a turnout, and to give warning when approaching a crossing; and it must not appear that such duties were disregarded, when they attempt to show themselves not guilty of negligence.

[14] Carroll *v.* N. Y. & N. H. R. 1 Duer, 571–2.

13. If one should expose himself to peril, contrary to the general regulations of the company notified to him generally, and especially by particular notice from the conductor at the time, as by letting his hand remain out of the car window, while passing a bridge, it is evidence of gross carelessness upon his part, which will, on that ground alone, justify a verdict against his claim for damages.[15]

*SECTION III.

INJURIES BY LEAPING FROM THE CARRIAGES.

1. *Passengers may recover, if they have reasonable cause to leap from carriage, and sustain injury.*
2. *But not where their own misconduct exposes them to peril.*
3. *But may recover if injured, in attempting to escape danger.*
4. *Cannot excuse leaping from cars because train passes station.*
5. *Must resort to their action for redress.*
6. *Rule of law, where train passes station.*

§ 151. 1. It seems to be regarded as well settled, that a passenger, who is induced to leap from the carriage, whether by coach or railway, by a well-founded apprehension of peril to life or limb, induced by any occurrences which might have been

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[15] Laing *v.* Colder, 8 Barr, 479. But see N. J. R. *v.* Kennard, 21 Penn. 203, where it was held that, if a railway company run passenger cars upon a road where the way is so narrow as to endanger the limbs of the passengers, while resting in the windows of the cars, they are bound to provide wire gauze, bars, slats, or other barricades, to prevent the passengers putting their arms out of the windows, or they are liable for all injuries happening in consequence of such omission. But to deprive the party of his right to recover, it must appear, that his violation of the rules of the company, or the orders of the company's servants, contributed to the injury. And where the conductor of a gravel train, who was prohibited by the company letting persons ride, as passengers, and who informed defendant in error of the prohibition, nevertheless consented to take him as a passenger, and received fare from him, it was held he might recover of the company for an injury, through the negligence of their servants, during his passage. Lawrenceburgh & Upper Miss. Railway *v.* Montgomery, 7 Porter, (Ind.) R. 474. See also Zemp *v.* W. & M. Railway, 9 Rich. 84. Where the plaintiff was injured, while standing on the platform of the cars, the passengers remaining in the cars uninjured, and it appearing that notices were posted up in the cars prohibiting passengers from standing on the platforms, it was held to be a question for the jury whether the plaintiff had notice of the prohibition, and also whether the fact of his disregarding it contributed to the injury, and they having failed to find these facts, and given the plaintiff ten thousand dollars damages, the judgment was affirmed in the Court of Appeals. Ib.

guarded against by the utmost care of the carrier, is entitled to recover for any injury which he may thereby sustain,[1] where no injury would have occurred if he had remained quiet,[2] or where the conduct of the passenger contributed to produce or enhance the injury.[3]

2. In one case where the passenger was taken upon the train after the passenger cars were filled, and was told that he must ride in the baggage car, and he consented to do so, but soon began boisterous play with others, and obtruded into the passenger cars, and, when they were thrown from the track, leaped upon the ground and was injured,[4] the court said: "The contract was for a passage in the baggage car. The carrier would have no right to overload and crowd passengers already in the other cars. When passengers take their seats they are entitled to occupy as against *the carrier and subsequent passengers. While this right is recognized and protected to them, they are required to conduct themselves with propriety, not violating any reasonable regulation of the train." The court also held that the passengers have no right to pass from car to car, unless for some reasonable purpose; and, as the proof showed that the plaintiff below had no such excuse, and, had he remained in the car where he belonged, would not have been injured, (that car not having been thrown from the track,) or, probably, have felt any impulse to jump from that car, it was his own fault and folly which exposed him to the peril, and the company were not liable for its consequences, and the action could not be maintained.

3. But, where one incurs peril by attempting to escape danger, the author of the first motive is liable for all the necessary or natural consequences.[5]

4. But where, as in the last case, the person leaped from the

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[1] Ingalls *v.* Bills, 9 Met. 1; Eldridge *v.* Long I. Railway, 1 Sand. 89; Stokes *v.* Saltonstall, 13 Pet. 181; Frink *v.* Potter, 17 Ill. R. 406.

[2] Jones *v.* Boyce, 1 Stark. R. 493; Ingalls *v.* Bills, 9 Met. 1.

[3] 13 Pet. Sup. Ct. R. 181.

[4] Galena & Ch. Railway *v.* Yarwood, 15 Ill. R. 468.

[5] Railroad Co. *v.* Aspell, 23 Penn. R. 147, 150. The court here say: "If, therefore, a person should leap from the cars under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company, for the injury he may suffer, will be as good as if the same mischief had been done by the apprehended collision itself." McKinney *v.* Neil, 1 McLean, R. 540, 550.

cars because the train was passing the station at which he wished to stop, and after the conductor had announced the station, notwithstanding the conductor and brakeman assured him the train should be stopped and backed to the station, it was held that the injury he received was the result of his own foolhardiness, and he could not throw it upon the company. The court below had charged the jury, that announcing the station by the conductor, while the cars were in motion, was itself an act of negligence, and the plaintiff had a verdict. But the judgment was reversed in the Court of Errors, who, in giving judgment, said:—

5. "If a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back, because these are direct consequences of the wrong done him. But, if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, and for this, his own gross imprudence, he can blame nobody but himself."

6. In regard to the conductor announcing the station, the court said, we consider the charge of the court below entirely wrong. * "It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we cannot see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of the station as an order to leap from the cars without waiting for a halt." And where the train passes its usual stopping-place, and a passenger leaps from the carriage while in motion to avoid being carried beyond his destination, and sustains an injury, he cannot recover.[6]

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[6] Damont *v.* New Orl. & Carrollton Railway, 9 Louis. Ann. R. 441.

SECTION IV.

INJURIES PRODUCING DEATH.

1. *Redress, in such cases, given exclusively by statute.*
2. *Form and extent of the remedy under the English statute.*
3. *Where the party is in fault, no recovery can be had.*
4. *By English courts no damages allowed for mental suffering.*
5. *In Pennsylvania, damages measured by probable accumulations.*
6. *In Massachusetts, company subjected to fine not exceeding* $5,000.
7. *Wife cannot maintain the action, for death of husband, or father, for death of child.*
8. *Form of the indictment.*
9. *If those having charge of passengers, not* sui juris, *leave them exposed, company not liable.*
10. *No action lies if death caused by neglect of fellow-servant or by machinery.*
11. *Servant liable for consequences of using defective machinery.*

§ 152. 1. Within the last few years, and chiefly it is presumed on account of the increased peril to life by railway travelling, it has been provided by statute, in England, and in most of the American states, that redress shall be given against the party causing a personal injury, from which death ensues. These acts, although intended chiefly to stimulate watchfulness and circumspection in passenger carriers, especially carriers by railways and steamboats, are, as was suitable, made general, and, in some of the states, the recovery is in the form of a penalty.

2. The English statute, usually denominated Lord Denman's Act,[1] provides that when death shall be caused by wrongful act, *neglect or default, such as would (if death had not ensued) have entitled the party to an action, in every such case, an action may be maintained by the executor or administrator of the party injured, and the jury may give such damages as shall be proportioned to the injury resulting from the death of the party to his family, to be divided among the parties named in the act, as the jury shall direct. Only one action can be brought, and that is to be commenced within twelve months of the decease of the party injured.

3. It is considered, that if the party's own negligence contributed to the injury, the action will not lie, any more than if the party had survived and brought the action himself.[2]

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1 9 & 10 Victoria, ch. 93.

2 Lord *Denman*, Ch. J., in Tucker *v.* Chaplin, 2 Car. & K. 730.

4. It has been held that, under the English statute, no damages are recoverable for the mental sufferings of the survivors, who are, by the act, entitled to share the amount recovered, but that the damages must be limited to the injuries of which a pecuniary estimate can be made.[3]

So if the negligence of those who carry the plaintiff, contributed to the injury, it is the same thing. Thoroughgood *v.* Bryan, 8 C. B. 115.

[3] Blake, Adm'r, *v.* The Midland Railway, 10 Eng. L. & Eq. R. 437.

Coleridge, J., said: "The important question is, whether the jury, in giving damages apportioned to the injury resulting from the death of the deceased, to the parties for whose benefit this action is brought, are confined to injuries of which a pecuniary estimate may be made or may add a *solatium* to those parties, in respect of the mental suffering occasioned by such death. . . . Our only safe course is to look at the language the legislature has employed. . . . The title of the act is, for compensating families of persons, &c. not for solacing their wounded feelings."

It was argued that the party, had he recovered, would have been entitled to such *solatium*.

"But it will be evident, this act does not transfer this right of action to his representative, but gives to his representative a totally new right of action on different principles." By the terms of the act, quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family." "This language seems more appropriate to a loss of which some estimate may be made, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly tends to the same conclusion. It seems to us that if the legislature had intended to go the extreme length, not only of giving compensation for pecuniary loss, but a *solatium* to all the relations enumerated in the act, language more clear and appropriate for this purpose would have been employed." And because the judge did not limit the damages to the pecuniary loss sustained by the death, a new trial was awarded. Hodges on R. 624.

There seems no doubt, according to the best-considered cases in this country, the mental anguish, which is the natural result of the injury, may be taken into account, in estimating damages to the party injured, in such cases, although not of itself the foundation of an action. Canning *v.* Williamstown, 1 Cush. R. 451; Morse *v.* Aub. & Sy. Railway, 10 Barb. 623.

But it has been held that in an action under the English statute to recover damages for the death of a person, the damages are not to be estimated according to the value of deceased's life, calculated by annuity tables, but the jury should give what they considered a reasonable compensation. Armsworth *v.* Southeastern Railway, 11 Jur. 758.

In the last case cited, *Parke*, Baron, instructed the jury, that they were "to determine, according to the ordinary rules of law, whether, if the deceased had been wounded by the accident, and were still living, he could recover compensation in the way of damages against the company for the wound given, under the

*5. In the American courts, the decisions in the different states will differ, as the statutes are different. The rule laid down in

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circumstances in evidence in the case," and estimate damages "on the same principle as if only a wound had been inflicted."

Another case is very strikingly illustrated, as applicable to the general subject, and the difficulties of laying down any rule in regard to damages in such cases, in an article in the London Jurist, Vol. 18, part 2, p. 1, for the following extract from which, we refer to the editor's note to Carey *v.* Berkshire Railway, 1 Am. Railw. Cas. 447.

The writer in the Jurist says: "On the 15th of December, 1852, the case of Groves *v.* The London & Brighton Railway Co. was tried at Guildhall, in the Court of Common Pleas, before *Jervis*, Ch. J. That was an action brought by the executor of the deceased, for the benefit of four infant children. That the deceased had met with his death through the negligence of the defendants' servants was admitted, the only question being the amount of damages. In summing up, the learned chief justice referred to the case of Blake *v.* London & Brighton Railway Co. and told the jury that in assessing the damages, they might take into consideration any injury resulting to the children from the loss of the care, protection, and assistance of their father. The jury gave 2,000*l.* Now, if the argument *ab inconvenienti* was permitted to prevail against the allowance of compensation for the mental anguish of the relatives, it ought not, we submit, to be without weight in considering the soundness of this direction. Juries have no small difficulties to contend with in assessing damages, when they have before them evidence of the average profits, or the amount of the life income of the deceased; but these are but trifling to those in which they must become entangled in attempting a *pecuniary* estimate of the loss of the care, protection, and assistance of a father. In whatever light we look at the subject, either of money or morals, we become perplexed in the attempt to pursue it. It is conceived that in such cases evidence may be given of the character of the deceased, and in many cases, this would doubtless be of a most painful nature.

"Moreover, serious, practical difficulties would arise. Let us suppose, that, through the negligence of a pointsman—in the belief of his employers a trustworthy servant—an accident happens to a train containing the six following fathers:—An archbishop, a lord chancellor, an East Indian director, a lunatic, a wealthy but immoral man, and one virtuous but a bankrupt. It is needless to dilate on the difficulties which juries would experience if called upon to estimate the pecuniary value of the parental care, protection, and assistance of each of these."

In a late English case serious doubts are suggested, whether an action will lie, under the English statute, to recover damages in the name of the administrator, for the death of an infant (so young as to be unable to earn any thing), by way of compensation for the loss of the services of the child, to the family. Bramhall *v.* Lee, 29 Law Times, 111. But in the case of Oldfield *v.* New York & Harlaem Railw. 3 E. D. Smith, 103, it is said that the New York statute, giving a right of action, in this class of cases, to the next of kin, does not limit the amount to be recovered to the loss of those only, whose relations to the deceased gave them a

*Pennsylvania[4] is, that the jury are to estimate damages "by the probable accumulations of a man of such age, habits, health, and pursuits, as the deceased, during what would probably have been his lifetime."

6. By the statute of Massachusetts,[5] passenger carriers, causing the death of any passenger through their own negligence or carelessness, or that of their servants or agents, within the commonwealth, are subjected to a fine, not exceeding five thousand dollars, to be recovered by indictment to the use of the executor or administrator of the deceased person, "for the benefit of his widow and heirs."

7. It was held that the wife cannot sustain an action for the death of her husband, under this act.[6] Nor can the father sustain such action for the loss of service of his child, by death.[7] Nor in either of the last two cases will an action lie at common law.[6 and 7]

8. In an indictment under this statute, it is not necessary to specify the names of the servants, or agents, guilty of the negligence, or the nature or manner of such negligence.[8]

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legal right to some pecuniary benefit, which would result from the continuance of the life. An action will lie in every such case, under the statute, where the deceased, had he survived, could have maintained one. The damages are not restricted to the actual pecuniary loss, but include present and prospective damages, in the discretion of the jury. Accordingly, in the present action, brought for the benefit of the mother of an infant daughter, seven years of age, killed in the streets of New York, by one of defendants' cars being drawn over her, it was held that a verdict for $1,300, did not justify the court in granting a new trial, the amount, although "large, not affording evidence of prejudice, partiality, or corruption."

[4] Penn. Railway Co. *v.* McClosky, 23 Penn. R. 526, 528. The court say: "The jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation."

[5] March 23, 1840. Proceedings under this act are not within the statute of limitations for actions, and suits for penalties. Commonwealth *v.* Boston & Worcester Railway, 11 Cush. R. 512.

[6] Carey *v.* The Berkshire Railway, 1 Cush. R. 475. And under the New York statute, giving an action to recover the pecuniary injury to the wife and next of kin, if there be no wife or next of kin, no action will lie. The husband cannot recover damages for the death of the wife. Lucas *v.* N. Y. Central Railway, 21 Barb. 245; Worley *v.* Cincin. Ham. & Day. Railway, 1 Handy, 481.

[7] Skinner *v.* Housatonic Railway, 1 Cush. 475.

[8] Commonwealth *v.* Boston & Worcester Railway, 11 Cush. R. 512. In an action upon the statute of Massachusetts, 1842, c. 89, § 1, which provides that

*9. The want of care in the deceased, which contributed to produce the injury, we have seen, will preclude the recovery of damages, under the statutes, allowing actions to be maintained in those cases where the party does not survive the injury. So, also, in the case of persons incapable of taking care of themselves, if those who have the custody of them, improperly expose them, and injury ensues, causing death, the company are not liable, although guilty of negligence. Where a lunatic was travelling in the cars, upon a railway, in charge of his father, who had paid the fare of himself and son through, and taken tickets, but who got out at a station to procure refreshments, leaving the son in the cars, without giving notice to any one of his situation, the train left before he returned. The conductor applied to the lunatic for his ticket, not knowing his condition, or that his fare had been paid. The lunatic, not surrendering his ticket, the conductor stopped the train and had him put out, where he was killed by another train. It was held, that no action could be maintained against the company, under the statute, the fault being upon the part of those who were responsible for the deceased, and not on that of the company, or its agents.[9]

"The action of trespass on the case for damage to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended, by or against his executors or administrators, in the same manner as if he were living," it was held, that the right of action depended on the question whether the testator, or intestate, lived after the act which constitutes the cause of action. *Shaw*, Ch. J., said: "If the death was instantaneous, and of course simultaneous with the injury, no right of action accrues to the person killed; and of course none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him, as a person *in esse*, and his subsequent death does not defeat it, but, by operation of the statute, vests it in the personal representative." Hollenbeck, Adm'r., *v.* Berkshire Railway, 9 Cush. 481. See also Mann *v.* Boston & W. Railway, id. 108.

9 Willetts *v.* N. Y. & Erie Railway, 14 Barb. R. 585. See also Hibbard *v.* N. Y. & Erie Railway, Court of Appeals, New York, June term, 1857. But the admissions of a deceased husband, against the interests of the wife, in an action for personal injury to her, brought, after the death of the husband, in her own name, such admissions being made after the alleged injury occurred, and while the husband, had a suit been instituted, must have been joined, are nevertheless inadmissible, on the ground that the husband is not the real, but only a nominal, or formal party. Shaw *v.* Boston & Worcester Railway, 5 Gray, R.; *ante*, § 150, n. 1, 2.

10. Nor does an action lie, under these statutes, where the death is caused by the negligence of a fellow-servant, unless such servant was habitually careless and unskilful; or if produced in the use of defective machinery, which the deceased knew to be unsafe.[10] *Nor where the death is caused by defective machinery, or through defect of fences, if the servant knew of the defect, and made no remonstrance.[11]

And it has even been considered in such case, that the servant, being an engineer, would be liable to any person injured by such defect.[11]

SECTION V.

SUITS WHERE THE INJURED PARTY IS A MARRIED WOMAN.

§ 153. For injuries to a married woman through the negligence of railways, as passenger-carriers, the husband may recover for expenses of the cure, and the loss of service,[1] and in one case it was held to extend to funeral expenses, as well as medical attendance, where the wife did not recover; but if death be instantaneous, no action lies at common law.[2]

But in a suit in the name of husband and wife where the wife survives, a recovery cannot be had for the expenses of cure.[3] In such action, recovery can only be had for the personal injury and sufferings of the wife. The action, in such case, for the loss of service, and of the society of the wife, and for the expenses of the cure, must be brought in the name of the husband alone.[4]

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[10] Hubgh *v.* New Orleans & Carrollton Railway, 6 Louis. Ann. R. 495. See *post*, § 170, n. 2, 9, 10; Timmons *v.* Central Ohio Railway, 6 Ohio State, 105.

But if the servant object to the use of machinery, as unsafe, and it is still used, whereby he loses his life, damages may be recovered under the statute. 33 Eng. L. & Eq. R. 1.

[11] McMillan *v.* Saratoga & Wash. Railway, 20 Barb. 449. It is here said the servant may require special indemnity against all risks, or he may give notice to the company, and throw the risk upon them.

[1] Pack *v.* Mayor of New York, 3 Comst. 489. And see Ford *v.* Monroe, 20 Wendell, 210, where it is held the father may recover, for killing his child, and for medical attendance upon his wife, the mother, caused by the death of the child.

[2] Eden *v.* Lexington & Frankfort Railway, 14 B. Monr. R. 204.

[3] Fuller & Wife *v.* The Naugatuck Railway, 21 Conn. 571.

[4] Cases cited above, 1, 2, 3.

*SECTION VI.

LIABILITY, WHERE TRAINS DO NOT ARRIVE IN TIME.

1. *Company liable to deliver passenger according to contract.*
2. *May excuse themselves, by special notice.*
3. *Liable for damages, caused by discontinuance of train.*
4. *Not liable for injury, caused by stage company, connecting with railway.*

§ 154. 1. It would seem, upon general principles, that railways should be liable for not delivering passengers within the stipulated time, as much as for not delivering goods according to their undertaking, unless they can show that such contract is subject to some exception which existed in the particular case. And in the county courts in England, it is said such actions have repeatedly been maintained.[1]

2. But if the company give proper notice, that they will not be responsible for the arrival of their trains, in time, it would seem they are not liable.

3. But where they advertise to run trains in a given mode, they are liable for any injury, which one who took an excursion ticket sustained, by not finding a return train on the day it was advertised, he having returned, by express, and sued the company for the expense.[2]

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[1] Hodges on Railways, 619. It was held in the U. S. Circuit Court, September, 1856, before *Nelson*, J., that where one sold tickets to carry passengers from Panama to San Francisco, and stipulated that the ship should leave on her trip in the month of April, 1850, he must run all hazards of wind and weather, and could not excuse himself, on account of any accidental or providential occurrence of that kind, having made no such exception in his contract. 19 Law R. 379.

[2] Hawcroft *v.* Great N. R. 8 Eng. L. & Eq. R. 362. See also Denton *v.* The Great Northern Railway, 34 Eng. L. & Eq. 154, where it is held that a railway company, continuing to advertise on their time tables that a train will leave a station at 7.20 and arrive at another point, beyond their line, at 12, after this connecting train is discontinued, and by consequence their own train of that hour, whereby one suffers pecuniary loss, in not being able to proceed by such train, and thereby being delayed in his arrival in season for his business, is liable to an action for such injury.

But in the case of Hamlin *v.* Great Northern Railw. 38 Eng. L. & Eq. R. 335, the plaintiff took passage in a train, which was advertised to go through the same night to the point of his destination, by connecting with the trains of another

*4. But the company, advertising that stages will run from their stations to other places off the line of the railway, and sell-

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company, it proved, on arriving at the point of connection, that the other train had left. The plaintiff was compelled to stay over night, and proceeded the next morning, having to purchase a new ticket for the remainder of the route, and did not arrive till one o'clock the next day. When he took defendants' train, he paid for and took a ticket through, and by the time tables advertised in defendants' office, he should have arrived at his destination 9.30, P. M., having taken the train at 2, P. M.

The plaintiff might have accomplished his journey that night, by taking a special conveyance and hiring a boat to cross the Humber, but he slept at a hotel, and proceeded the next morning by the public conveyance, but arrived too late to meet his customers, according to appointment, and was obliged to hire conveyances to see some of them elsewhere, and was detained several days, waiting for the market-days, to see others. It was held that he was only entitled to recover his hotel expenses, and the railway fare the next day, and was not entitled to recover for any damage whatever in consequence of not reaching his destination, according to defendants' undertaking. This case seems to have taken rather an extreme view of the rule of damages on this subject. The very least the defendants could have expected to pay for the breach of duty should have been, it would seem, the expense of a special conveyance through that night. The rule here adopted seems to be almost equivalent to a denial of all beneficial redress in such cases. For it is scarcely to be supposed, that actions would ever be brought to recover such insignificant damages. It is quite supposable that one might suffer very serious loss in consequence of such a failure to arrive in time, and if an action is maintainable, it should not be made a terror by attaching to it a rule of damages, which will render it as expensive to the plaintiff, as to the defendants, who are solely in fault. It seems also at variance with some former decisions in the English courts. See cases above in this note. We conjecture that this rule will not be ultimately followed in the courts of Westminster Hall. *Martin*, Baron, who tried the case at *Nisi Prius*, seems to have placed it upon the ground, that the defendants, having no knowledge of plaintiff's business, or its necessities, could not fairly be supposed to have undertaken to indemnify him against this loss. But the learned judge conceives the defendants may stand upon the terms of their contract. And if the plaintiff, instead of remaining over night, had gone forward the same night, as he might have done, and as by the contract he was entitled to do, the defendants would have been liable for the additional expenses. This may perhaps be the more just and practicable rule, in cases where the party had ample time to proceed by express, in season for his appointments. But if instead of doing so, he delays for the next train, and thereby suffers damage, beyond what would have been necessary to defray the expense of going forward according to the contract, we see no reason why the company should not, at all events, bear that portion of the loss, which was necessarily incurred, in consequence of their breach of contract.

No question is made in the case, in regard to the special damage not being specifically declared for. If that question had been made, there might have been

ing tickets, at their stations, for such places, that is, to carry upon the railway to the nearest stations and then by stage, will not render the company liable for any injury to such passenger upon the stage, after he leaves the railway, the company having no ownership, or interest in the stages. This does not constitute a special contract to carry, as far as the ticket reaches.[3] But the facts are certainly very analogous to many cases, where a special contract has been held to exist, in regard to carrying goods beyond the line of the carrier to whom first delivered.[4]

*SECTION VII.

WHAT WILL EXCUSE COMPANY FROM CARRYING PASSENGERS.

1. *Company not bound to carry, where carriages full.*
2. *But must carry according to terms which they advertise.*
3. *Not bound to carry disorderly passengers or those otherwise offensive.*

§ 155. 1. It would seem upon general principles, that railway companies might excuse themselves from carrying passengers beyond their present means, if they were adequate to all ordinary occasions, and they had no reason to expect an increased press of travel, at that particular time. But it should undoubtedly be an extreme case, to justify an absolute refusal to carry a passenger, since it could scarcely be supposed ever to occur, that a railway, in any sense properly equipped, for the purpose of carrying passengers and freight, should not be able to meet all emergencies in some way. And if the occasion were unusual, it might excuse some discomfort in the mode of conveyance.

2. But it is said by *Patteson*, J., in one case, where the company had issued an excursion ticket, stipulating to run trains in a given mode, that they could not excuse themselves, by showing the carriages were all filled.[1] The learned judge said: "They

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some ground for saying, that it did not come within the general averments found in the declaration, which is the only ground upon which it seems to us, the case can be made to stand with the earlier English cases upon the subject. Hutchinson *v.* Granger, 13 Vt. R. 386; *ante*, § 131, n. 14.

3 Hood *v.* N. Y. & N. H. Railroad Co. 22 Conn. R. 1.

4 *Ante*, § 135. But in Connecticut it has been held, that such a contract by a railway company is *ultra vires*. *Ante*, § 136.

1 Hawcroft *v.* The Great N. R. 8 Eng. L. & Eq. R. 362. In regard to the

should have made it a condition of their contract, that they would not carry unless there was room." By the by-laws in regard to railways in England, established by the Board of Trade, every passenger is required to book his place and pay his fare, when he receives his ticket, and this is subject to the condition that there shall be room in the train, for which he is booked. If not, those booked for the greatest distance have the preference.[2]

3. But it has never been considered, in this country, that passenger carriers, in any mode, were bound to receive passengers who refused to conform to their reasonable regulations, or were not of quiet and peaceable behavior, or for any reason not fit associates, for the other passengers, as if infected by contagion, or in *any way offensive in person, or conduct.[3] But where the carrier of passengers has no reasonable excuse, he is bound ordinarily to carry all that offer.[4] And this has been regarded as a duty, growing out of the employment of common carriers of passengers, and altogether independent of the contract between the parties, but which may undoubtedly be controlled by contract.[5]

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general duty and liability of common carriers of passengers, or those who held themselves out as such, see *ante*, § 131. It is said to have been held, by some court, in the case of Foland *v.* Hudson River Railway, that a passenger who is not furnished with a seat, is not obliged to pay fare, and if he is expelled from the cars for refusing such payment, may sustain an action against the company. Such a rule must require much qualification. If the passenger is not accommodated in a manner which he deems a fair compliance with the duty of the company as passenger carriers, he may decline any compromise, and resort to his action against the company, for refusing to carry him, as their contract, by the ticket, or their duty, required. And he might, no doubt, sustain such action, unless the company proved some just excuse. But if he chooses to accept of a passage, without a seat, the general understanding undoubtedly is, that he must pay fare. But if he goes upon the cars, expecting proper accommodations, and is put off, because he declines going in that mode, he may still resort to his action.

[2] Hodges on Railways, 553. *Ante*, § 26, n. 6.

[3] Jencks *v.* Colman, 2 Sumner, R. 221; Markham *v.* Brown, 8 N. H. R. 523. In these cases the persons excluded were in the interest of rival lines of carriers, and at the time engaged in the promotion of such interests.

[4] Hollister *v.* Nowlen, 19 Wendell, 239; Bennett *v.* Dutton, 10 N. H. R. 486, where the subject is very elaborately and satisfactorily discussed by Mr. Ch. Justice *Parker*. Galena & Ch. R. *v.* Yarwood, 15 Ill. 472.

[5] Bretherton *v.* Wood, 3 Bro. & Bing. 54; s. c. 9 Price, 408.

SECTION VIII.

RULE OF DAMAGES FOR INJURIES TO PASSENGERS.

1. *All damage, present and prospective, is recoverable.*
2. *But these should be obvious, and not merely conjectural.*
3. *New trials allowed for excessive damages.*
4. *But this only allowed in extreme cases.*
5. *Counsel fees not to be considered.*
6. *Some English judges doubt if damages should be claimed as compensation for pain.*
7. *Not so viewed generally.*
8. *Plaintiff may show value of his time lost.*
9. *Generally rests very much in discretion of jury.*
10. *In actions for loss of service, cannot include mental anguish.*

§ 156. 1. The question of damages is one resting a good deal in the discretion of a jury, and must of necessity be more or less uncertain. But certain general rules have been established upon the subject. It is decided that the party must recover all his damages, present and prospective, in one action.[1]

2. But in another case,[2] it was said by the court, "It was certainly proper for the jury in estimating the damages to the plaintiff to regard the effect of the injury, in future, upon her health, the use of her limbs, her ability to labor and attend to her affairs, and generally to pursue the course of life she might otherwise have done," and its effect in producing bodily pain and suffering, but all *these should be "the legal, direct, and necessary results of the injury, and that those, which at the time of the trial were prospective, should not be conjectural."

3. Courts will sometimes grant new trials for excessive damages in such cases, as where the statute limited the amount of

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[1] Hodsoll *v.* Stallebrass, 11 Ad. & Ellis, 301; Whitney *v.* Clarendon, 18 Vt. R. 252; Curtis *v.* Roch. & Sy. Railway, 20 Barb. 282; Black *v.* Carrollton Railway, 10 Louis. Ann. R. 33.

[2] Curtis *v.* Roch. & Sy. Railway, 20 Barb. 282. See also Morse *v.* Auburn & Sy. Railway, 10 Barb. 621.

In the case of Hopkins *v.* Atlantic & St. Lawrence Railway, Sup. Court N. H. July, 1857, it was held, that in an action by the husband, for an injury to the wife, through the negligence of the company, the plaintiff may give evidence of expense of cure, and loss of services, after the commencement of the action, as well as before; and the jury may give prospective damages also. The jury may also give exemplary damages, in their discretion, where the injury was caused by the gross negligence of the company, in the management of their trains. 20 Law Rep.

recovery in case of death to $5,000, and the jury assessed damages in a case of injury, not resulting in death, at $11,000, the court ordered a new trial, unless the excess above $5,000, should be remitted in twenty days.[3]

4. The rule laid down by *Kent*, Ch. J., as justifying a new trial for excessive damages, is, that they should be so excessive "as to strike all mankind at first blush, as beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, corruption, or prejudice."[4] This is no doubt a safe rule, and perhaps the only safe one, in such cases, but there are probably many cases where new trials have been granted for this cause, falling far short of this in excessiveness.

5. In some of the American states, in trials at *Nisi Prius*, in conformity with a single English case, the plaintiff has been allowed to add to his actual damages of loss of time, expense of cure, pain, and suffering, and prospective disability, if any,—counsel fees not recoverable by way of taxable costs.[5] But this does not seem to be countenanced by the English courts in the later decisions.[6]

6. In a recent English case, a distinguished judge, Ch. B. *Pollock*, says, "A jury most certainly have a right to give compensation for bodily suffering, unintentionally inflicted. But when I was at the bar, I never made a claim in respect of it, for I look on it, not so much as a means of compensating the injured person, as of *damaging the opposite party. In my personal judgment, it is an unmanly thing to make such a claim. Such

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[3] Collins *v.* Alb. & Schen. Railway, 12 Barb. 492. So where six thousand dollars was awarded for a broken leg, of which the party recovered in about eight months, a new trial was granted. Clapp *v.* Hudson River Railway, 19 Barb. 461. But where the plaintiff had been disabled for two years, and the injury seemed likely to be permanent, $4,500 was held not exorbitant. Curtis *v.* Roch. and Syr. Railway, *supra*.

[4] Coleman *v.* Southwick, 9 Johns. 45. See also Southwick *v.* Stevens, 10 Johns. 443.

[5] *Shaw*, Ch. J., in Barnard *v.* Poor, 21 Pick. 381. But this rule is here condemned, and also in Lincoln *v.* Saratoga and Sch. Railway, 23 Wend. 435.

[6] Grace *v.* Morgan, 2 Bing. N. C. 534; Jenkins *v.* Biddulph, 4 Bing. 160; Sinclear *v.* Eldred, 4 Taunt. 7. The only English case where this claim is countenanced, is Sandback *v.* Thomas, 1 Stark. R. 306. See Webber *v.* Nicholas, 1 Ryan & M. 419.

injuries are part of the ills of life, of which every man ought to take his share." [7]

7. The principle of this remark seems to be conceived in a more philosophic and Christian temper, than would be altogether consistent with bringing any action at all. But it is sometimes refreshing to find minds soaring above the dead level of pecuniary equivalents, to which the profession are, for the most part, doomed, in our connection with estimating the damages to be awarded for personal injuries.

8. It has been held the plaintiff might give evidence of the nature of his business and the value of his services in conducting it, as a ground of estimating damages, by an injury through the negligence of the company, but not the opinion of witnesses as to the amount of his loss.[8]

9. In actions against carriers of passengers, for injuries, there seem, as we have said, to be no well-defined rules for estimating damages. It is a matter to be submitted to the sound discretion and judgment of the jury, who are to consider the actual loss to the plaintiff, present and prospective, which is the very lowest amount they will feel justified in giving in any case. Beyond this any rule for damages must be regarded as, more or less, *terra incognita.* There is no doubt juries often give damages altogether beyond any actual damage, which it is supposed the party has sustained in a pecuniary point of view. And it is not uncommon in charging juries upon this subject to bring their attention, in considering the question of damages, to the degree and character of the misconduct of the defendants, or their agents, and even to the public example of the trial and verdict. This has been sometimes seriously criticized by elementary writers, and sometimes as we have seen by judges, but we find no cases where new trials have been granted, on account of such suggestions being given in charge to the jury. And when it is considered that verdicts in civil actions are the only effectual corrective of a most flagrant disregard of human life, which often

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7 Theobald *v.* Railway Passengers' As. Co. 26 Eng. L. & Eq. R. 438. But see Curtis *v.* Roch. and Sy. R. 20 Barb. 282, where the rule of the American law upon the subject is fully stated, as cited in the text (2.) Damages arising from this source need not be specially stated in the declaration, unless of an unusual and unexpected character. Id. *Ante*, § 131, n. 14, § 154, n. 2.

8 Lincoln *v.* Saratoga and Sch. Railway, 23 Wend. 425.

occurs in the transportation of passengers, we are not prepared to say that the jury are bound altogether to shut their eyes to the public example of their verdicts.[9]

10. In an action[10] by the father for loss of service from an injury to his infant son, fourteen years of age, it was held that no damages could be given for the shock to the father's feelings, that being a proper consideration only in an action in the name of the son, for the direct injury.[10]

SECTION IX.

CARRIERS OF PASSENGERS AND GOODS CANNOT DRIVE WITHIN THE PRECINCTS OF A RAILWAY STATION.

§ 157. We have seen that it is competent for railways to make by-laws regulating the conduct of passengers, and the use of stations, and other matters concerning the traffic.[1]

It seems to be considered by the English courts, that even in a case where passengers, by the existing statutes and by-laws of

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[9] Farrish *v.* Reigle, 11 Grattan, 697.

[10] Black *v.* Carrollton Railway, 10 Louis. Ann. R. 33. And in the case of Coakley *v.* The North Pennsylvania Railw. 10 Am. Railw. Times, No. 12, 6 Law Reg. 355, tried in the city of Philadelphia, for the death of a child fourteen years of age, by a collision of trains upon defendants' road, the court adopted a similar view in regard to the rule of damages. They said it was not a case for exemplary damages; the jury were to take into consideration the pecuniary services of the child until of age, and the expense incurred by the plaintiff after the accident, and the value of the society of the child, which might be regarded as the strongest claim. But they were not to consider the anguish of the parents, nor were they to inquire what a man would take for a child, for this would be speculative damages, and in this view, the value of human life is beyond all price.

The rule thus laid down is perhaps about as accurate as any one could give. But it is evident it will not bear strict analysis. For how can one estimate the value of the society of a child to a parent, and not consider the mental anguish consequent upon the death. It is the same thing, under different forms of speech.

All that can properly be said is, that the question of damages, within reasonable limits, rests entirely in the discretion of the jury. They are to be watchful, that their verdict shall not be so inadequate to the injury as to appear like a denial of justice, nor so extravagant as to indicate that they have assumed the office of avengers of the plaintiff's wrongs, without due consideration of any apology for the defendants' conduct, which to some extent exists in all cases.

[1] *Ante*, § 26, 27, 28.

the company, applicable to the subject, have the right to insist upon coming upon the grounds adjoining the stations of the company, and even where the company generally allow omnibus drivers and other passenger carriers, to come within the precincts of their stations, without objection, that a particular carrier of passengers, who was excluded from this privilege, had no ground of action against the company on that account.[2]

*SECTION X.

DUTY RESULTING FROM THE SALE OF THROUGH PASSENGER TICKETS, IN THE FORM OF COUPONS.

1. *Not the same, as where goods and baggage are ticketed through.*
2. *It is to be regarded as a distinct sale of separate tickets for different roads.*
3. *The first company are to be regarded as agents for the others.*
4. *If the business of the entire line is consolidated, it is different.*
5. *But in general it is not regarded as a case of partnership.*

§ 158. 1. As the general duty of common carriers of passengers is different from that of common carriers of goods, so the

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[2] Barker *v.* Midland Railway Co. 36 Eng. L. & Eq. R. 253. This case is put, by the court, upon the ground of want of privity in contract, and also, that the grounds adjoining railway stations are not dedicated to public use, in any such sense as to become a public highway for carriages.

The 2d section of the English "Railway and Canal Traffic Act, 1854," 17 & 18 Vict. c. 31, provides, that railway companies shall afford reasonable facilities for receiving and forwarding traffic, without any preference or advantage to particular persons. The court in this case intimate, that even if the company are liable, under this act, for the injury here complained of, the party must pursue the specific remedy given by the statute. *Willes*, J., said: "The action is founded upon the supposed duty of the defendants, to let the plaintiff come on their lands, and it is suggested that the duty arises from the fact of their allowing the public generally to come on it; but it is not stated that the defendants have dedicated the place to the public use, so as to make it public. Then it is said that it is the duty of the defendants, as carriers, to allow persons to bring passengers and goods on to the station. But it would be rather extraordinary, if a person, to whom no direct duty was due by the company, could maintain an action, when the passengers could not, because it is not averred that they were ready and willing to pay the fare, which is essential. Pickford *v.* The Grand Junction Railway Company, 8 M. & W. 372. But the action is not maintainable, also, on another ground. A third person cannot bring an action for the result of a breach of duty towards another person. The last case of that kind was where a passenger, by a coach, brought an action against the coach-maker for a breakdown. If such actions were permitted, the courts would be inundated with them."

implied contract, resulting from the sale of through tickets for passengers is different. In the case of carriers of goods, and the baggage of passengers, we have seen that taking pay and giving tickets or checks through, binds the first company ordinarily for the entire route.[1]

2. But in regard to carrying passengers, the rule is different, we apprehend. These through tickets, in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads, with ordinary passenger baggage, sometimes for thousands of miles, in this country, import, commonly, no contract with the first company to carry such person beyond the line of their own road. They are to be regarded as distinct tickets for each road, sold by the first company, as agents for the others, so far as the passenger is concerned; and unless the first company check the baggage beyond their own line, *it is questionable, perhaps, how far they are liable for losses happening beyond their own limits.[2]

3. And the contract which exists between the companies commonly, in regard to the division of the price of the through tickets, constitutes no such partnership as will render each company liable for injuries or losses occurring upon the whole route. The first company is, in such case, viewed as the agent of the other companies, and the transaction requires no different construction from one where the tickets of one company are sold at the stations of other companies, which is not very uncommon, and would never be regarded in any other light than that of agency merely.[2]

4. We are aware that in regard to consolidated lines of travel consisting of different companies, or natural persons, originally, where the entire fare is divided ratably, and all losses are deducted, it has been held to constitute such a partnership, as to render them all liable to third persons.[3]

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[1] *Ante*, § 128, 135.

[2] Sprague *v.* Whittemore, 29 Vt. R.; Hood *v.* New York & New H. Railway, 22 Conn. R. 1; s. c. 502. When this case last came before the court, held, that the defendants were not estopped from denying, that under their charter they had power to enter into a contract to carry passengers beyond their own road. But in this respect the case stands alone, probably, at present. See Ellsworth *v.* Tartt, 26 Ala. R. 733; *post*, § 162; Stratton *v.* New York & New H. Railway, 2 E. D. Smith, 184.

[3] Champion *v.* Bostwick, 11 Wend. 572; s. c. 18 Wend. 175.

5. But in a recent case where the subject seems to have been a good deal examined, the rule is thus laid down :[4] "If the several proprietors of different portions of a public line of travel, by agreement among themselves, appoint a common agent at each end of the route to receive the fare, and give through tickets, this does not of itself constitute them partners, as to passengers who purchase through tickets, so as to render each one liable for losses occurring on any portion of the line."

*SECTION XI.

HOW FAR THE DECLARATIONS OF THE PARTY ARE COMPETENT EVIDENCE.

1. *Are competent to show state of health, in connection with other facts.*
2. *But not to show the manner in which the injury occurred.*

§ 159. 1. In trials for injuries to passengers, it has been allowed to show the plaintiff's complaints, of the state of his health, and that he has not labored at his trade, being poor, and having a considerable family.[1]

2. But in practice, at *Nisi Prius*, it has generally been considered inadmissible, to show the statements of the party injured, in regard to the manner in which the injury occurred, as for instance the manner of driving, or the rate of speed, the declarations of the party being competent only as to invisible, and insensible effects of the injury, such as bodily and mental feelings, which are of necessity shown, by the usual and only modes of expression, applicable to the subject.[1]

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[4] Ellsworth *v.* Tartt, 26 Ala. R. 733. And a similar rule is adopted in Briggs *v.* Vanderbilt, 19 Barb. 222, in regard to passenger transportation between New York and San Francisco, the line consisting of three independent companies, who had no common interest in the business throughout the route, although they advertised together, as one line. And, in this case, where the defendant gave the plaintiff a ticket for a passage by a particular ship, which had already been wrecked, without the knowledge of either party, it was held the defendant was liable for the money received for the ticket, in an action for money had and received, as for the failure of the consideration for which the payment was made.

[1] Caldwell *v.* Murphy, 1 Duer, 233; s. c. 1 Kernan, 416; 1 Greenleaf, Ev. § 102; Aveson *v.* Kinnaird, 6 East, R. 188; Bacon *v.* Charlton, 7 Cush. 581. In an action for damage sustained through defects in a highway, it is not competent for the plaintiff to give evidence of his declarations to his physician, in regard to the cause of the injury for which the physician was consulted. Chapin *v.* Marl-

SECTION XII.

PASSENGERS WRONGFULLY EXPELLED FROM CARS.

1. *Company not held liable for exemplary damages unless they ratified the expulsion.*
2. *But upon principle the company should be liable for special damage.*
3. *Are trespassers if they refuse to deliver baggage in such cases.*

§ 160. 1. It has been held that a passenger, who was wrongfully expelled from the company's cars, after having surrendered his ticket, the conductor not crediting his statement, was not entitled to recover vindictive or punitive damages, against the company, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed.[1]

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boro, 20 Law Rep. 653, in Supreme Court of Mass. Nor in an action for damages, by reason of collision between two carriages upon the highway, can the plaintiff give evidence of the declarations of defendant's servant, that the plaintiff was not in fault, made at the time of the accident, and while the defendant was being extricated from the carriage. Lane *v.* Bryant, 20 Law Rep. 653.

[1] Hagan *v.* Providence & Worcester Railway, 3 Rhode Island R. 88. This was an action on the case, and the rule of damages given to the jury, approved in the Superior Court was, "That all damages for actual injury, loss of time, pain of body, money paid for employment of physician, or injury to the feelings of defendant, might be allowed." This is as far as most cases go, in this form of action, unless in slander and libel; and it has been seriously questioned, how far damages in any case, should be given, for exemplary or punitive purposes. But in practice, that has more commonly been allowed, when the party acts in bad faith, and from feelings of vindictiveness. And in the case of railway companies, who are incapable of such motives personally, it is rather intimated in the case cited above that they would never be liable for such damages, unless upon some formal ratification of the act of their agent. But, upon principle, it would seem that if the agent was so situated as to represent the company in the particular transaction, and for the time, they should be liable to the same rule of damages as the agent, although the form of action may be different.

If the act is that of the company, they should be held responsible for all its consequences, and there seems quite as much necessity for holding the company liable to exemplary damages, as their agents. It is difficult to perceive why a passenger, who suffers indignity and insult, from an inexperienced or incompetent conductor of a train, should be compelled to show the actual ratification of the act of the conductor, in order to subject the company to exemplary damages, if the transaction was really of a character to demand such damages, and the company are liable at all. It would rather seem that the reasoning of the court,

*2. But no doubt if one were put out of the cars wrongfully, and thereby suffered serious detriment in his business, he might be entitled to recover special damages, but not probably, without declaring specially, in regard to such damages.

3. Where a ship-owner refused to carry a passenger, whom he had engaged to carry, and proceeds on the voyage, without giving the passenger reasonable opportunity to remove his baggage, or with the intent to carry it beyond his reach, it was held, that he thereby terminated the contract of carriage, and was liable, in trespass.[2]

SECTION XIII.

PAYING MONEY INTO COURT, IN ACTIONS AGAINST PASSENGER CARRIERS.

1. *Payment into court in general count, and tort, only admits damages to extent of sum paid.*
2. *But in cases of special contract, admits the contract and breach alleged.*

§ 161. 1. Where a declaration in tort is general, and without specification of the particulars of the cause of action, the payment of *money into court admits a cause of action, but not the cause of action sued for, beyond the amount paid into court, and the plaintiff must give evidence, before he is entitled to damages, beyond the amount paid into court.

2. But if the declaration is specific, so that nothing is due, unless the defendant admits the specific claim, in the declaration, the payment of money into court admits the cause of action sued for,[1] both the contract and the breach of it.

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carried to its full extent, would show, that the conductor, in that portion of his conduct, which was tortious, did not represent the company at all. Upon the same principle it was at one time held, that a corporation is not liable to indictment, for the misfeasance of its agents. *Post*, § 225; *ante*, § 131, 137, 154.

[2] Holmes *v.* Doane, 3 Gray, 328.

[1] Perren *v.* Monmouthshire Railway and Canal Co. 20 Eng. L. & Eq. R. 258. The declaration here stated a contract to carry plaintiff from N. to E., and a negligent breach of duty, in the performance of it, and damages. Plea, payment of 25*l.* into court. Replication, damages *ultra*. Held, the negligence was admitted, and the plaintiff was entitled to recover all damages proved, even beyond the 25*l.*, without introducing proof to show defendant guilty of negligence on his part.

The general subject of the effect of paying money into court, will be found examined, to some extent, in Hyde *v.* Moffatt, 16 Vt. R. 286; Bacon *v.* Charl-

SECTION XIV.

LIABILITY WHERE ONE COMPANY USES THE TRACK OF ANOTHER.

1. *Statement of the facts of a case.*
2. *Company not liable to passengers for torts committed by strangers.*
3. *Same liability towards passengers coming from other roads, as in other cases.*

§ 162. 1. In a recent case, the plaintiff had employed the defendants to transport cattle from Vermont to Boston, by their trains. By the custom of defendants, the plaintiff was allowed to go, as a passenger, in a saloon car attached to the cattle train, without additional charge, to enable him to look after the cattle. This train, in its passage, went over the Northern New Hampshire Railway, that company furnishing the motive power, with their engineer and fireman, but the defendants' conductor continuing with the train through the route. While the train was passing over the Northern New Hampshire Railway, without any fault of those who had the management of it, but through the sole negligence of the other servants and employees of the Northern New Hampshire Railway, the saloon car, which carried the plaintiff, was broken in by a collision with another train, going in the same direction, and the plaintiff seriously injured.

*2. It was held, that the undertaking of the defendants, in regard to carrying plaintiff, was only that of ordinary passenger carriers, and did not render them responsible for injuries which he might sustain by the misconduct of other parties;[1] that the

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ton, 7 Cush. 581. See also upon this general subject, Stapleton *v.* Nowell, 6 M. & W. 9; Fischer *v.* Aide, 3 M. & W. 486; Story *v.* Finnis, 3 Eng. L. & Eq. R. 548.

[1] Sprague *v.* Trustees of Vermont Central Railway, 29 Vt. R. It was argued, in this case, that, as the defendants' contract bound them absolutely to carry the freight, and the plaintiff went, as incidental to the main contract, the same kind of liability should be assumed, in regard to him, if not to the same extent. But the plaintiff can in no sense be regarded otherwise than as a passenger. The same rule applies to agents, and servants, and to negro slaves. United States *v.* The Thomas Swan, (Dist. Court of U. S. Dist. South Carolina,) before *Magrath*, J., 19 Law R. 201. There is the same difference between the liability of carriers always, for the person of a passenger, and for his baggage. In the case of Sullivan *v.* Philadelphia & Reading Railw. 6 Am. Law Reg. 342, it is decided, that a railway company cannot excuse themselves, as carriers of passengers, where injury occurs, in consequence of cattle straying upon the track, through

plaintiff being aware, from the very nature of the transaction, that he would be exposed to perils of this character, must be supposed to undertake, upon his own part, to sustain that hazard; and could not justly be allowed to throw it upon an innocent party, who was known to him at the time of entering into the contract, to have no control over the persons causing the plaintiff's injury.[2]

3. In a recent case in Massachusetts, it was held, that a railway company, which receives the cars of another company upon its track, placing them under the control of its agents and servants, and drawing them by its locomotive power, assume towards the passengers the common liability of passenger carriers,[3] and that it makes no difference, in regard to the liability of the company, to passengers passing over their road, whether they purchase tickets of them, or of any other railway company, or agent, authorized to sell such tickets.[3]

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* CHAPTER XVIII.

EXCESSIVE TOLLS, FARE, AND FREIGHT.

1. *English companies created sometimes, for maintaining road only.*
2. *Where excessive tolls taken may be recovered back.*
3. *So also may excessive fare and freight.*
4. *By English statute, packed parcels must be rated in mass.*
5. *Nature of railway traffic requires unity of management and control.*
6. *Tolls upon railways almost unknown here. Fare and freight often limited.*
7. *Guaranty of certain profit on investment lawful.*
8. *Restriction of freight to certain rate per ton, extends to whole line.*
9. *Need not declare for tolls.*
10. *Mode of establishing, and requisite proof.*

§ 163. 1. By the English statutes, companies are created who own the railway, stations, &c. merely, and who are empowered

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defect of fences, which as to the owners of the cattle, the company were not bound to maintain, because such act is a trespass against the company. It is the duty of the company to exclude cattle from their track, for the security of their passengers. But this rule would not probably be extended to such acts of trespass, as no reasonable foresight or caution could have anticipated or guarded against. *Post*, § 166, n. 5.

[2] Bridge *v.* Grand J. Railway, 3 M. & W. 244; Thoroughgood *v.* Bryan, 8 C. B. R. 115, 129.

[3] Schopman *v.* Boston & Worcester Railway, 9 Cush. R. 24.

to demand certain tolls of other persons, or companies, for the use of such road.

2. In such cases, if illegal tolls are demanded and paid, the excess may be recovered back, as money had and received, to the use of the person paying it, upon the general principles of law applicable to the subject of tolls, and the demand and receipt of excessive tolls.[1]

3. And the same rule has been extended to the recovery of money overpaid upon an exorbitant and illegal demand of freight or fare, by railways. And the recovery may be had, although the person paying it did not tender any specific sum, as due, and although a portion of the overcharge was on account of what was claimed to be due another company.[2]

*4. And under the English statutes, packed parcels of the same class, are required to be rated in mass.[3]

5. Most of the business upon public railways, in this country and in England, at the present time, is almost of necessity transacted by the companies themselves. The very nature of the business seems to require absolute unity, in the management and control of the traffic, and especially in this country, where a large proportion of the roads are operated upon a single track, requiring the utmost watchfulness and circumspection, to avoid collisions. We suppose the idea of operating a railway, in England, upon a single track, would be regarded as too glaring an absurdity to be seriously entertained. But in this country it is

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[1] Fearnley *v.* Morley, 5 B. & C. 25. See also this subject very extensively examined in Centre Turnpike Co. *v.* Smith, 12 Vt. R. 212; *post*, § 181. Tolls are a payment for passing along the line of the railway, and should be received with reference to the number of carriages passing. Simpson *v.* Denison, 13 Eng. L. & Eq. R. 359.

[2] Parker *v.* The Bristol and Exeter Railway Co. 6 Railw. C. 776. See also Snowden *v.* Davis, 1 Taunt. 359; Atlee *v.* Backhouse, 3 M. & W. 633; and Spry *v.* Emperor, 6 M. & W. 639, where the general subject is discussed. In Parker *v.* The Great Western Railway Co. 3 Railw. C. 563, the very point is decided. Crouch *v.* London & N. W. Railway Co. 2 Car. & K. 789; Crouch *v.* Great Northern Railway, 25 Eng. L. & Eq. R. 449.

[3] Parker *v.* The Great Western Railway Co. 8 Eng. L. & Eq. R. 426. This subject of overcharge and the right to recover back the excess, is extensively discussed in this case, and in the case of Edwards, Assignee of Edwards, *v.* The Same Company, 8 Eng. L. & Eq. R. 447; Crouch *v.* Great Northern Railway Co. 25 Eng. L. & Eq. R. 449.

rather the rule than the exception, and many of the continental railways, in Europe, have only a single track.

6. The matter of tolls, upon railways, is a thing almost unknown in this country, and very little practised anywhere, at present. But the English special acts, and the American railway charters, very often, fix the maximum of freight and fare, which it shall be lawful for the company to receive, and if tolls are allowed to be taken of other companies, or persons, these also are limited.

7. A guaranty of a certain amount of profit to a company, by other companies, in consideration of the right to use the track of such company, is lawful.[4]

8. The restriction in the charter of the Camden & Amboy Railway, of freight, to eight cents per ton, per mile, extends to the whole distance of the line of said company, although some of it is by water, and includes the auxiliary roads through New Brunswick and Trenton.[5]

9. In an action to recover tolls due to a railway it is not necessary to describe the dues, as tolls. Any description which sufficiently identifies the nature of the service, for which compensation is demanded, is all that is required.[6]

10. Freights upon a railway may be established by the directors, or by their agents; and their assent will be presumed, if nothing appear to the contrary.[6] And where the directors are required to establish freights, and they do establish a printed tariff, that is to be regarded as the original; and where copies of such tariff are required to be posted, at the depots, or stations of the company, that affords sufficient excuse for the absence of such copies, to justify the admission of secondary evidence.[6]

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4 Great N. Railway *v.* S. Yorkshire Railway, 25 Eng. L. & Eq. R. 482.

5 Camden & Amboy Railway *v.* Briggs, 1 N. J. (Zab.) 406.

Where one company leased its line to another, at a certain rate, for all minerals transported, among other commodities, it was held, that the owners of minerals transported upon such line, could not, by injunction, compel the lessees to transport minerals upon the same terms, on which they agreed with the other company, by way of compensation to them, the latter being a rent merely, and not a rate of toll or freight. Finnie *v.* Glasgow & Southwestern Railway Co. 30 Law Times, 26.

6 Manchester & Lawrence Railw. *v.* Fisk, 33 New H. R. 297.

*CHAPTER XIX.

LIABILITY FOR FIRES, COMMUNICATED BY COMPANY'S ENGINES.

1. *Fact of fires being communicated evidence of negligence.*
2. *This was at one time questioned in England.*
3. *Opinion of Tindal, Ch. J., upon this point.*
4. *English companies feel bound to use precautions against fire.*
5. *Rule of evidence, in this country, more favorable to companies.*
6. *But the company are liable for damage by fire through want of care on their part.*
7. *One is not precluded from recovery, by placing buildings in an exposed situation.*
8. *Where insurers pay damages on insured property, may have action against company.*
9. *Where company made liable for injury to all property, are allowed to insure.*

§ 164. 1. In the English courts it seems to have been settled, as early as the year 1846,[1] upon great consideration, that the fact of premises being fired by sparks emitted from a passing engine, is *primâ facie* evidence of negligence on the part of the company, rendering it incumbent upon them to show, that some precautions had been adopted by them, reasonably calculated to prevent such accidents.

2. In an earlier case, where the facts were reported, by the judge, at *Nisi Prius*, for the opinion of the full court, that a stack of beans near the track of the railway was fired and consumed by sparks from the company's engine, of the ordinary construction, and used in the ordinary mode, the court said the facts reported did not show necessarily, either negligence, or no negligence. That was a question for the jury.[2]

3. But the court in the case of Piggott *v.* Eastern Co.'s Railway, went much further. *Tindal*, Ch. J., said: "The defendants are a company intrusted, by the legislature, with an agent of an extremely dangerous and unruly character, for their own private and particular advantage; and the law requires of them, that they shall, in the exercise of the rights and powers, so conferred upon them, adopt such precautions as may reasonably prevent damage *to the property of third persons, through or near which their railway passes. The evidence in this case was abundantly sufficient to show, that the injury of which the plaintiff com-

[1] Piggott *v.* Eastern Counties Railway Co. 3 C. B. 229.

[2] Aldridge *v.* Great Western Railway, 3 M. & G. 515; 2 Railw. C. 852.

plains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendants' engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think the jury came to a right conclusion, in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance, the case of Mitchil *v.* Alestree, 1 Vent. 295, for an injury resulting to the plaintiff from the defendant's riding an unruly horse in Lincoln's Inn Fields; that of Bayntine *v.* Sharp, 1 Lutw. 90, for permitting a mad bull to be at large; and that of Smith *v.* Pelah, 2 Stra. 1264, for allowing a dog, known to be accustomed to bite, to go about unmuzzled. The precautions suggested by the witnesses, called for the plaintiff in this case, may be compared to the muzzle in the case last referred to. The case of Beaulien *v.* Finglam, in the Year-Books, P. 2, H. 4, fol. 18, pl. 5, comes very near to this. There, the defendant was charged, in case, for so negligently keeping his fire as to occasion the destruction of the plaintiff's property adjoining. The duty there alleged was—"*quare, cum secundum legem et consuetudinem regni nostri Angliæ hactenus obtentam, quod quilibet de eodem regno ignem suum salvò et securè custodiat, et custodire teneatur, ne per ignem suum damnum aliquod vicinis suis eveniat.*"

4. The principle of this case seems to have been acquiesced in, by the railways in England,[3] and such precautions used, as to secure the engines against emitting sparks. In this last case it was held proper evidence to go to the jury, that the company's *engines had before, in passing along the line, emitted

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[3] Hammon *v.* Southeastern Railway Co. Maidstone Spring Assizes, 1845, before Lord *Denman*, Ch. J., for the destruction of farm buildings, including a thatched barn, by sparks emitted from the defendants' engines in passing along the line of their railway. There was evidence of the fire being so caused, and that defendants' engines had no wire guard, or perforated plate, to prevent the escape of the sparks, although both were in use before that time. There was evidence in this case that it was principally, where the engines were overtasked, that they were liable to emit sparks. His Lordship directed the jury that it lay upon the plaintiffs to establish negligence, they were to consider that the plaintiffs might have saved all hazard by tiling his barn, and also whether the train was driven too fast. The plaintiff had a verdict, and the court subsequently refused a new trial. Taylor *v.* Same Co. was tried at same term, with similar proof and the same result. Walford on Railways, 183, 184, and notes.

sparks, a sufficient distance to have done the injury in the present case, as a means of ascertaining the possibility of the building being fired in the manner alleged. The testimony in this case showed, that the danger of emitting sparks is very much increased, by overtasking the engine, and that it may be altogether avoided, by shutting off the steam, in passing a place, where there is danger from sparks, or that the danger may be guarded against, by mechanical precautions.

5. But in this country it must be confessed the rule of the liability of railways for damage done, by fire communicated by their engines, is more favorable to the companies than in England. It seems to have been assumed, in this country, that the business of railways being lawful, no presumption of negligence arises from the fact of fire being communicated by their engines.[4]

6. In this country it has been held that proof, that sparks have upon other occasions been emitted and caused fires along the line of the road, is not admissible, either to show that defendants' engine caused the damage, or to rebut defendants' proof of care and diligence in using their engines.[5] But the testimony seems to have been received in other cases.[6] All the cases upon this subject hold railways bound to the exercise of care, skill, and diligence, to prevent fires being communicated in this mode, and make them liable, in case of damage through their negligence.[7]

7. And one is not precluded from recovery in such case, by having placed his buildings or other property in an exposed position.[8]

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[4] Rood *v.* N. Y. & Erie Railway, 18 Barb. 80; Lyman *v.* Boston & W. Railway, 4 Cush. R. 288; Burroughs *v.* The Housatonic Railway, 15 Conn. R. 124. In this case the court compare the injury to that of fire communicated by sparks from the chimney of a dwelling-house. Where the statute requires the company to show that the fire occurred "without any negligence on their part," it was held sufficient to show that their engines were properly constructed, in good order, and had the usual apparatus for preventing the escape of sparks, and were managed by discreet persons. B. & S. R. *v.* Woodruff, 4 Maryland, 242.

[5] Baltimore & Susquehannah Railway *v.* Woodruff, 4 Maryland R. 242.

[6] McCready *v.* The Railway Co. 2 Strob. 358.

[7] 15 Conn. R. 124; Huyett *v.* Phil. & R. Railway, 23 Penn. 373. The jury are to determine the question of negligence. Id. The company are bound to use more care in regard to fires, in a very dry time, or where property is very much exposed. Id.

[8] Coop *v.* Champ. Trans. Co. 1 Denio, 91, 99, 101.

8. And where the railway companies are made liable for all *damage in this way, as they are in Massachusetts, and some of the other states, by statute, if one whose property is insured suffer loss in this way, and the insurers pay him his entire loss, they may recover in his name against the company.[9] And it was decided in one case that the insurer might recover of the carriers in the name of the consignor, on whose behalf the policy was effected, after having paid the amount of the loss to the consignor.[10]

We cannot forbear to add that the interference of the legislatures upon this subject, in many of the American states, seems to us an indication of the public sense, in favor of placing the risk, in such cases, upon the party in whose power it lies most to prevent such injuries occurring. There seems to us both justice and policy in the English rule upon the subject.

9. By statute in some of the states, as we have seen, railways are made liable for any injury to "buildings or other property of any person—by fire communicated," by their locomotive engines, and it is sometimes specially provided that railways shall have an insurable interest in such property. But it has been held that such statutory liability only extends to property of a permanent nature, and upon which an insurance may be effected; and that for injuries of this kind to other property the company will only be responsible for negligence, unskilfulness, or imprudence, in running and conducting their engines.[11]

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9 Hart *v.* The Western Railway, 13 Met. 99. And under such a statute, where the sparks from the engine communicated fire to a shop, and the wind drove the sparks from the shop sixty feet across the street, and set fire to a house, it was held that this second fire must be regarded as "communicated" by the company's engine, within the statute. Id.

In a contract of insurance in favor of a railway company, upon "cars of all descriptions"—"on the line of their road and in actual use," where in answer to the inquiry "where the property was situated," the company reply, "from Boston to Fitchburg and branches this side of Fitchburg;" and cars of the plaintiff's company loaded with ice, standing upon a track belonging to the proprietors of a wharf where the ice was unloaded, but communicating with the track of the Fitchburg road, were burned by a fire communicated from the wharf, it was held to come within the contract, and the insurance company were held liable. Fitchburg Railway *v.* Charlestown Mutual Ins. Co. 5 Gray R.

10 Burnside *v.* Steamboat Company, 10 Rich. (S. C.) R. 113.

11 Chapman *v.* Atlantic & St. Lawrence Railway, 37 Maine R. 92. This is an action for the loss of cedar posts, piled upon land adjoining the railway, by the

*CHAPTER XX.

INJURIES TO DOMESTIC ANIMALS.

1. *Company not liable unless bound to keep the animals off the track.*
2. *Some cases go even further, in favor of the company.*
3. *Not liable where the animals were wrongfully abroad.*
4. *Not liable for injury to animals, on land where company not bound to fence.*
5. *Where company bound to fence are* primâ facie *liable for injury to cattle.*
6. *But if owner is in fault, company not liable.*
7. *In such case company only liable for gross neglect or wilful injury.*
8. *Owner cannot recover, if he suffer his cattle to go at large, near a railway.*
9. *Company not liable in such case, unless they might have avoided the injury.*
10. *Where company are required to keep gates closed, are liable to any party injured by omission.*
11. *Opinion of Gibson, Justice, on this subject.*

12 and 17. *Not liable for consequences of the proper use of their engines.*

13. *Questions of negligence ordinarily to be determined by jury.*
14. *But this is true only where the testimony leaves the question doubtful.*
15. *Actions may be maintained sometimes, for remote consequences of negligence.*

16 and 18. *Especially where a statutory duty is neglected by company.*

§ 165. 1. The decisions upon the subject of injuries to domestic animals, by railways, are very numerous, but may be reduced to a comparatively few principles. Where the owner of the animals is unable to show that, as against the railway they were properly upon the track, or in other words, that it was through the fault of the company that they were enabled to come upon the road, the company are not, in general liable, unless after they discovered the animals, they might, by the exercise of proper care and prudence, have prevented the injury.

2. Most of the better considered cases certainly adopt this view of the subject, and some perhaps go even further in favor of exempting the company from liability, where they were not originally in fault, and the animals were exposed to the injury through the fault of the owner, mediately or immediately.

3. For instance, if the animal escape into the highway and thus get upon the track of the railway, where it intersects with the highway, and is killed, the company are not liable.[1] And if

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consent of the owner of the land, and set on fire by a spark from the defendants' engine, and they were held not liable under the statute.

[1] Towns *v.* Cheshire Railway, 1 Foster, R. 363; Sherrod *v.* London and N. W. Railway, 4 Exch. 580.

the * animals are trespassing upon a field, and stray from the field, upon the track of the railway, through defect of fences, which the company are bound to maintain, as against the owner of the field, and are killed, the company are not liable, either at common law or under the English statute,[2] or upon the ground that the defendant exercised a dangerous trade. The obligation to make and maintain fences, both at common law and under the statute, applies only as against the owners or occupiers of the adjoining close.[3]

4. So where the statute requires railways to fence their road, where the same passes through "inclosed or improved lands," if injury happen to another's cattle through want of fences, upon common or uninclosed land, it is not legally imputable to the negligence of the company.[4]

5. But if the railway are bound to maintain fences, as against the owner of the cattle, and they come upon the road through defect of such fences, and are injured, the company are, in general, liable without further proof of negligence.[5]

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[2] 8 & 9 Vict. ch. 20, § 68.

[3] Ricketts *v.* The East and West India Docks and Birm. J. Railway, 12 Eng. L. & Eq. R. 520. The same point is ruled in the following cases. Jackson *v.* Rut. & Bur. Railway, 25 Vt. R. 150. See also cases referred to in § 166, 167. And it was held, Man. Sh. & Lincolnshire Railway *v.* Wallis, 25 Eng. L. & Eq. R. 373, that a railway are not bound to fence against cattle straying upon a highway running along the railway, and that they are not liable for an injury sustained by cattle in getting from such highway upon the railway, through a defect of the fences maintained by the company; although the cattle strayed upon the highway without any fault of the owner. Brooks *v.* N. Y. & Erie Railway, 13 Barb. 594. But in the Midland Railway *v* Daykin, 33 Eng. L. & Eq. R. 193, it was held that where a colt strayed from a field, upon a public road, abutting upon which was a yard not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open, and while the colt was being driven back to the field, by the servants of the owner, it escaped into the yard, and thence upon the railway, where it was killed by a passing train, the company were liable. *Jervis*, Ch. J., says, "I can see no room to doubt that that was a lawful use of the highway."

[4] Perkins *v.* Eastern Railway and The Boston & M. Railway, 29 Maine R. 307. And if by the common usage cattle have the right to run upon uninclosed land, the owner incurs the risk of all accidents. Knight *v.* Abert, 6 Barr, 472; Phil. and Germ. Railway *v.* Wilt, 4 Whart. 143.

[5] Snydam *v.* Moore, 8 Barb. 358; Waldron *v.* Rensselaer and Sar. Railway, 8 Barb. 390; Horn *v.* Atlantic and St. Lawrence Railway, 19 Law Rep. 694; Smith *v.* Eastern Railway, 20 id. 288. But where the cattle come upon the rail-

6. But where the statute imposes the duty of building fence upon the railway, they may lawfully stipulate with the land owners * to maintain it, and if such land-owner suffer his cattle to be where they may come upon the railway, without building the fence, he cannot recover of the company.[6] So, too, if the plaintiff leave down the bars at a cattle crossing, whereby his cattle go upon the railway and are killed, he cannot recover.[7]

7. And where the cattle go upon a railway through defect of fences, which the owner is bound to maintain, and suffer damage, the owner has no claim upon the company, unless perhaps, for what has sometimes been denominated gross negligence, or wilful injury,[8] for in such cases the cattle are regarded as trespassers,[8] and the owner, the cause of the injury sustained, unless the railway might have prevented it.

8. And it was held to be gross negligence for the owner of cattle to suffer them to go at large, in the vicinity of a railway, whether the same was fenced or not.[9]

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way, at a point not proper to be fenced, as at the intersection of a highway, or at a mill yard, the company are not liable for injury to them, unless the plaintiff prove some fault on the part of the company's servants, besides the want of fences. Indianapolis & C. R. *v.* Kinney, 8 Ind. R. 402; Lafayette & Ind. Railw. *v.* Shriner, 6 Ind. R. 141.

[6] Tower *v.* Prov. and Wor. Railway, 2 Rhode Island R. 404, 411; Clark *v.* Sy. & Utica Railroad, 11 Barb. 112; C. H. & D. Railway *v.* Waterson, 4 Ohio St. R. 424. So also, where the duty of maintaining the fences along the railway, is upon the land-owner, and it is burned down by fire, communicated by the company's engines, and he suffers his fields to remain unfenced, whereby his cattle go upon the track, and are killed, he cannot recover. If the company are in fault, and liable to damages in regard to the fire, this does not oblige them to rebuild the fence, nor will it justify the plaintiff in suffering his fields to remain unfenced except at his own peril. Terry *v.* New York Central Railway, 22 Barb. 574.

[7] Waldron *v.* Portland, S. & P. Railway, 35 Maine, 422.

[8] Tonawanda Railway *v.* Munger, 5 Denio, 255; s. c. 4 Const. R. 349; Clark *v.* Syracuse and Utica Railway, 11 Barb. R. 112; Williams *v.* Mich. Central Railway, 2 Mich. 259. In this case the horses were wrongfully upon the railway, and the court say "they (the company) cannot be held liable for any accidental injury which may have occurred, unless the lawful right of running the train was exercised without a proper degree of care and precaution, or in an unreasonable or unlawful manner." See also Garris *v.* Portsmouth and Roanoke Railway, 2 Ired. 324; C. H. & D. Railway *v.* Waterson, 4 Ohio St. R. 424; C. C. & C. Railway *v.* Elliott, 4 Ohio St. R. 474.

[9] Marsh *v.* N. Y. and Erie Railway, 14 Barb. 364; Talmadge *v.* Rensselaer and Saratoga Railway, 13 Barb. 497; Louisville and Frankfort Railway *v.* Wilton,

*9. It has been held not to be sufficient in such cases to charge the company, to show that they were running at an unreasonable rate of speed, or without proper care in other respects.[10] The only question in such case is, we apprehend, whether the company, after discovering the peril of the animals, might have so conducted as to have prevented the injury.[10] The same rule obtains, which does in actions for personal injuries, where there is fault in both parties.

10. And it has been held that where the statute, in general terms, requires railways to keep gates, at road-crossings, constantly closed, that one, whose horses leaped from his field into the highway, and then strayed upon the railway, by reason of the gates not being kept constantly closed, and were killed, might recover of the company.[11] In such case it was held, that as to the company, the horses were lawfully on the highway, as the provision in the statute in regard to keeping the gates shut, was intended for the protection of all cattle, horses, &c. passing along the highway, whether strayed there or not, unless perhaps when voluntarily suffered to run at large in the highway. And the duty of keeping cattle-guards at road-crossings, has been considered to extend to the protection of all animals in the street, and to be a duty which the railway owe the public generally,

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14 B. Monroe, R. 75. This is where the plaintiff below suffered the company to build a railway through his field without stipulating that they should fence the track, and his cattle running upon the track while depasturing in the field were killed, and the court held the company are not liable, "unless the injury could have been avoided with reasonable care." But in Housatonic Railway *v.* Waterbury, 23 Conn. 101, it was held that in such case the company hold their easement subject to the land-owner's right to cross and recross, to and from the different sections of his farm, provided the right is reasonably exercised, and that the land-owner is not chargeable with negligence in letting his cattle run on his land unfenced, unless he knew they were accustomed to keep near the track, thus imposing a duty of watchfulness on both parties.

10 Vandergrift *v.* Rediker, 2 N. J. R. (Zab.) 185; Clark *v.* Sy. & Utica Railway, 11 Barb. 112; Williams *v.* Mich. Central Railway, 2 Mich. 259; Lafayette & Ind. Railway *v.* Shriner, 6 Porter (Ind.) R. 141. Here it is held the company are liable for gross negligence, even where the cattle are wrongfully upon the road.

11 Fawcett *v.* York & North M. Railway, 2 Eng. L. & Eq. R. 289. But it is a question for the jury, under the circumstances, whether they believe the gates were left open, by the fault of the company's servants, or the tort of a stranger. Walford, 179, citing two *Nisi Prius* cases, (1842,) (1845.)

and not merely the owners of cattle driven along the highway, which, in strictness, is the only condition in which cattle are rightfully in the highway, at common law.[12]

11. In the New York & Erie Railway *v.* Skinner,[13] *Gibson*, J.,

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[12] Trow *v.* The Vermont Central Railway, 24 Vt. R. 487. And in Railroad *v.* Skinner, 19 Penn. R. 298, it is said, that if cattle are suffered to go at large, and are killed or injured on a railway, the owner has no remedy against the company, and may himself be made liable for damage done by them to the company; and it is unimportant whether the owner knew of the jeopardy of the cattle; and that it is error to submit the question of negligence to the jury, unless there is some evidence of such fact.

In a late case in the Circuit Court of Virginia, in error from the County Court, The Richmond & Petersburgh Railw. *v.* Mrs. Jones, this subject is discussed, at length, 6 Am. Law, Reg. 346. It appeared, upon the trial of the case before the jury, that the company had been assessed in damages to the land-owners along the line of their road, in consequence of additional fence being required, by reason of the construction of the railway. The animal, for killing which the suit was brought, was found dead near the crossing of the highway and railway, in such a state as to show that it had been killed by collision with the company's engines very near the crossing. The plaintiff below suffered the beast to run at large and graze upon the uninclosed lands in the neighborhood of the railway, her own land not lying in immediate contact with the line of the railway. The case, not being of sufficient amount to authorize its being carried to the Court of Appeals, the decision was final, and the case is discussed at length upon the principles involved, and the following points ruled :—

Primâ facie the company are not liable, even when cattle are killed, at a road crossing. Both the owner of the cattle and the company, in such case, being apparently in the exercise of their legal rights, the law presumes no breach of duty, and thus imposes upon the party who alleges such breach the burden of proof. To entitle the owner in such case to recover of the company, he must prove want of care or skill on the part of the company.

But where cattle are killed along the line of the road, and not at a road crossing, the case is much less favorable to the owner, inasmuch as the company, having paid the expense of fencing to the land-owners adjoining, are entitled to have cattle excluded from their track. And the statute, depriving the company of an action against the owner of cattle for damages, caused by their straying upon the road, does not render it lawful for cattle to be allowed to go there unrestrained by fences.

[13] 19 Penn. 298; 1 Am. Law Reg. 97. But in Danner *v.* South Carolina Railway, 4 Rich. 329, it was held, that the fact that cattle pasturing on one's own land, are injured by a railway company's trains, is *primâ facie* evidence of the liability of the company, and that the company could only excuse themselves, by showing, from the manner the injury occurred, that they were not guilty of negligence. And that for this purpose, the company must show, not only that the injury was not intentional, but that it was unavoidable, and occurred without the least fault on the part of the engineer. But to the maintenance of an action on

lays *down the rule in the broadest terms, that railways, independent of statutory requisitions, and as against the adjoining land-owners, are under no duty whatever to fence their road, nor are they bound to run with any reference whatever to the possibility of cattle getting upon the track. Every man is bound, at his peril, to keep his cattle off the track, and if he do not, and they suffer damage, he has no claim upon the company, or their servants, and is liable for damages done by them to the company or its passengers. The opinion contains many sensible suggestions, and is curious for the enthusiasm and zeal manifested by one already beyond the ordinary limit of human life. These views have sometimes been adopted in the jury trials in other states, and as reported in the newspapers, in a recent case in Wisconsin, Prichard *v.* The La Crosse & Milwaukie Railway. But, they are certainly not maintainable to the full extent, in any

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the case for such injury, it is requisite to show, that it arose from the negligence of the company, and if it appear to have been wilful, or accidental, this action will not lie. This seems to be assuming the extreme opposite of the case last cited. The truth will be found to lie between them, doubtless. But the rule in Danner's case does not apply where the animal killed is a dog. Wilson *v.* Railway Company, 10 Rich. (S. C.) R. 52. But it does apply to the killing of a horse at night. Murray *v.* Same, id. 227.

By the law of South Carolina cattle must be fenced out, not fenced in. The entry, therefore, of cattle, as a horse, upon an uninclosed railway track, is no trespass. Murray *v.* Railroad Company, id. 227. And it was held, that the owner of a horse, permitted to roam at large over uninclosed land, is not guilty of such negligence as will embarrass his recovery, should the horse be killed by the negligence of another. Ib.

The statute in Georgia, 1847, makes railway companies liable for all damages done to live-stock or other property. But it was held they were not liable when the damage was caused by the design or negligence of the owner. Macon & W. Railway *v.* Davis, 13 Ga. 68. And in New York it is held, that their general statute, making railway companies liable for all damage done to cattle, horses, and other animals, until they shall fence their roads, renders them liable to the owner of cattle, which strayed into an adjoining close, where they were trespassers and thence upon the railway, or from the highway upon the railway. And that it makes no difference how the cattle came upon the railway, unless it is by the direct act, or neglect of the owner, so long as the company do not fence their road according to the requirements of the statute. Corwin *v.* N. Y. & Erie Railway, 3 Kernan, 42. In this case the company had contracted with the land-owner to build the fence, which he had not done, and it was admitted, that if he had owned the cattle he could not recover. It is somewhat remarkable, that the rights of the owner of cattle trespassing, should be superior to those of the owner of the land.

country where the maxim *sic utere tuo ut alienum non laedas* prevails, even to the limited extent recognized in the common law of England.

12. It has been considered that a railway is not responsible for injuries to horses, in consequence of their being frightened, on the road, by the noise of the engine and cars, in the prudent and ordinary course of their operations.[14]

13. The subject of negligence in the plaintiff, which will prevent his recovery, is discussed much at length, in Beers *v.* The Housatonic Railway,[15] and in the main the same views are adopted in *regard to injuries to cattle, which we have stated in regard to injuries to persons.[16] It is there laid down, by the court, that whether there was negligence, or want of care, in whatever degree, by either party, is a question of fact, to be determined by the jury, and that even where the circumstances are all admitted, it will not be determined, as a question of law, but the inference of negligence, or no negligence, is one of fact for the jury.

14. But this, we apprehend, is true only, where the circumstances leave the inference doubtful. If the proof is all one way, either in favor of or against negligence having intervened, the inference is always one of law for the court.[17]

15. There are some few cases, where actions have been brought for injuries to cattle or horses, in consequence of some alleged remote negligence in the company. In one case,[18] the action was for the loss of a horse, by falling into a large well upon the company's grounds. The plaintiff had frequent car-loads of lumber coming to the company's station, and he requested them to remove it to a position on their track, where it could be discharged into his own lumber-yard, which they declining to do, he drew it with this horse, to the proper point, and unloaded it. Upon another car arriving he attempted to do the same, without consulting the company, but his horse proved restive and backed

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[14] Burton *v.* The Phil. Wil. & Balt. Railway, 4 Harr. 252.

[15] 19 Conn. R. 566.

[16] *Ante*, § 150, and cases cited; Chicago & Mis. Railway *v.* Patchin, 16 Ill. R. 198.

[17] Underhill *v.* N. Y. & Harlaem Railway, 21 Barb. 489; Lyndsay *v.* Conn. & Pas. Rivers Railway, 27 Vt. R. 643. Scott *v.* W. & R. Railw. 4 Jones, Law R. 432.

[18] Aurora Branch Railway *v.* Grimes, 13 Ill. R. 585.

off the track, and in his struggle, fell into the well. The plaintiff had a verdict below, and a new trial was awarded, upon the ground, that the duty of the company to exercise care and prudence, depends upon the question, whether the plaintiff is in the exercise of a legal right. For if not, he must show that he exercised extraordinary care before he can be permitted to complain of the negligence of another.

16. And in another case,[19] the plaintiff's horse was killed, by breaking a bloodvessel in struggling from fright at the defendants' train of cars, in its near approach to the turnpike road, which by their charter they were required to purchase, and in crossing all roads to restore them to their former state of usefulness. At the place of the injury the defendants excavated their road-bed upon * the turnpike, some five feet below the surface, leaving a steep descent upon the railway, and no fence between the track of the turnpike and railway. The plaintiff was passing along the turnpike, leading his horse, at the time. It was held, that under their charter, the company were liable, if the excavation impaired the safety of the turnpike, for public travel, and that such "encroachments of defendants upon a turnpike is a public nuisance, for which any person sustaining a particular injury may maintain an action."

17. And it has been laid down, in general terms, that a railway company, authorized to use steam locomotive engines, upon their road, is not liable, for the damage or disturbance caused, by such use, near a turnpike road existing before the railway company, unless such engines are used in an extraordinary and unreasonable manner.[20]

18. And where the legislature imposed a penalty upon railways, of $100, for every month's delay, in performing the duty of keeping and maintaining legal and sufficient fences, on the exterior lines of their road, as required by their charters, it was held, that the neglect of the corporation to perform this duty, rendered them liable to reimburse any person suffering injury thereby, in his property, in an action at common law. And if the defect in the fences, by which the injury occurs, were known

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[19] Mozier *v.* Utica & Sch. Railway, 8 Barb. 427. But see Coy *v.* Utica & Sch. Railway, 23 Barb. 643.

[20] Bordentown & South A. Turnpike *v.* Camden & Amboy Railway, 2 Harrison, 314; Coy *v.* Utica & Sch. Railway, 23 Barb. 643.

to the company, they are liable for the damage suffered, notwithstanding their engineer was, at the time, in the exercise of due care, and notwithstanding the fence was originally imperfectly built, by the plaintiff, for the company.[21]

*CHAPTER XXI.

FENCES.

SECTION I.

UPON WHOM RESTS THE OBLIGATION TO MAINTAIN FENCES.

1. *By the English statute, there is a separate provision made for fencing.*
2. *This provision is there enforced against the companies by mandamus.*
3. *But where no such provision exists, the expense of fencing is part of the land damages.*
4. *And where that is assessed, and payment resisted by the company, the land-owner is not obliged to fence.*
5. *In some cases it has been held the fencing is to be done equally, by the company and the land-owner.*
6. *Assessment of land-damages, on condition company build fences, raises an implied duty on their part.*
7. *In some states, owners of cattle not required to confine them upon their own land.*
8. *Lessee of railway bound to keep up fences and farm accommodations.*
9. *Company bound to fence land acquired by grant.*
10. *Farm-crossings required wherever necessary.*
11. *Where land-owner declines farm accommodations.*
12. *Fences and farm accommodations not required for safety of servants and employees.*
13. *Requisite proof where company liable for all cattle killed.*

§ 166. 1. By the Railways Clauses Consolidation Act,[1] it is made the duty of the railways in England, before they use land,

[21] Norris *v.* Androscoggin Railway, 39 Maine R. 273. In this case the fence was stone-wall, built by plaintiff, by contract with the company some two years before, and accepted by them. The gap in the wall whereby the animal escaped upon the track of the railway, occurred several days before, and was known to the defendants. There was no other evidence of the manner of constructing the wall. The court held the plaintiff stood in the same position, as to his claim, as if any other one had built the wall.

[1] 8 & 9 Vict. ch. 20, § 40. But in Kyle *v.* Auburn & Rochester Railway, 2 Barbour's Ch. R. 489, the court declined to interfere by injunction, to compel the building of a farm crossing, although the company assumed before the jury, that

for any of their purposes, to fence it, and make convenient passes for the owner, which, if the parties do not agree, are to be determined by two magistrates. Under this statute it has been held, that the railway is not excused from making the necessary accommodations to keep up communication, to the owner, between different * parts of lands, intersected by the line of a railway, because these are not defined, in the arbitrators' award of land damages. They are totally distinct things from the land damages.[2] And where the jury assessing land damages, also made a separate verdict, for the expense of crossing the railway, by a private way, it was considered, that they exceeded their jurisdiction, and their proceedings were quashed.[3]

2. It is considered, in the English courts, that the expense of fences, and crossings, being imposed upon the railways, by statute perpetually, and the mode of enforcing its performance pointed out, in the statute, it has no connection with the land damages, but is to be enforced under the statute, and land damages are to be appraised, upon the basis of that duty resting upon the railway.

3. But where the statute makes no such provision, the expense of fencing, and making crossings, are important considerations, in estimating damages, for the land taken, and this expense should undoubtedly be borne, by the company, in addition to paying the value of the land, for otherwise the land is taken without an equivalent.

4. And where in such circumstances the commissioners as-

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such a crossing should be built by them, the plans showing no such crossing. It is said, under such circumstances, to be the duty of the land-owner, to make necessary crossings, and that he is a trespasser, for crossing the railway without them; and this should be so considered, in assessing damages for taking the land, and compensation made for such expense.

[2] Skerratt *v.* The North Staffordshire Railway, 5 Railw. C. 166, per Lord *Cottenham*, Chancellor. See *post*, § 193, n. 3.

[3] *In re* South Wales Railway Co. *v.* Richards, 6 Railw. C. 197. So too where the land-owner stipulated with the promoters for certain watering-places and other conveniences, and to accept £5,000 for especial damage, and to withdraw thereupon opposition to the bill, it was held the duty to make suitable watering-places might be enforced by mandamus. Reg. *v.* York & N. Midland Railway, 3 Railw. C. 764; *infra*, § 167, 190, 191. The provision for fences, in the English statute, being a separate, independent, general provision, is enforced, altogether aside of the proceedings to assess land damages.

sessed the land damages, and a separate sum for building fences, and judgment was rendered in favor of the land-owner, for both sums, but the payment resisted, by a proceeding in chancery, on the part of the railway, and while this was still undecided, the company commenced running their engines, and the cattle of the occupier of the land, strayed upon the track and were killed, by the engines of the company, it was held,[4] that the obligation to maintain the fence rests primarily upon the company, and until they have either built the fences, or paid the land-owner for doing it, a sufficient time to enable him to do it, the mere fact, that cattle get upon the road, from the land adjoining, is no ground for imputing negligence to the owner of the cattle.[4]

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[4] Quimby *v.* Vermont Central Railway Co. 23 Vt. R. 387; see also Vanderkar *v.* Rensselaer & Sara. Railway, 13 Barb. 390. But in the English Railway Acts, where the company is required to make crossings, where land is divided, and the mode of determining the nature of the crossings is to be referred to two justices, upon the application of the land-owner, ("in case of any dispute,") it was held, that until the company have made a communication, a party whose land had been severed by the railway, has a right to pass from one portion of his property to the other, across the railway, at any point, and that the section requiring the owner to pass at such a place, as shall "be appointed" for crossing, means, "when such places shall have been appointed." Grand Junction Railway *v.* White, 2 Railw. C. 559. And where at the time of appraising land damages, the land-owner, in the presence of the agents of the company, pointed out to the commissioner the place where he would have a farm-crossing, and no objection was made by the company, and the sum awarded was paid, but the company, in constructing their road, were throwing up an embankment at that point, and locating the crossing at a different place, where it would be inconvenient for the land-owner, an injunction was granted, until the company should either make a suitable crossing, or compensate the land-owner. Wheeler *v.* Rochester & Sy. Railway, 12 Barb. 227; Milwaukie & Mis. Railway *v.* Eble, 4 Chand. R. 72. It is here held, that the land-owner is entitled to include, in his damages, the expense of fencing, as incidental to the taking of the land. But the contrary is held in a very elaborate case in Iowa, Henry *v.* Dubuque & Pacific Railway, 2 Clarke, R. 288. But the argument of the court seems to us unsatisfactory and suicidal.

And where the railway, at first, contracted with the land-owner, to build the fence for them at a specified price, but a controversy arising, in regard to land damages, the commissioners reported a sum which was finally confirmed by the court, and an additional sum, for the expense of building the fence, and the plaintiff took judgment, and execution, for this also, and subsequently built the fence, according to his contract with the company, and sued the company for the price, it was held that he could not recover, the former judgment having merged the contract, and imposed upon him the duty to build the fence, under the award and judgment. It was also held that the land-owner could not claim

*5. In some cases, in this country, it has been held, that the railway and the adjoining land-owner are to defray equal proportions of *the expense of maintaining fences, upon the principle of being adjoining proprietors, and having equal interest in having the fence maintained, unless the land-owner chooses to let his land lie in common, and in that case the company must be at the whole expense of fencing, as a necessary protection and security to their business.[5]

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to recover any thing, beyond the award, for having built the fence, according to the original contract, which rendered it more expensive to him, than it would otherwise have been. Curtis *v.* Vermont Central Railway, 23 Vt. R. 613; 1 Am. Railw. C. 258; see Lawton *v.* Fitchburg Railway, 8 Cush. 230.

And where the statute requires the company to make farm-crossings where they divide land, it is not proper for the jury, in assessing compensation to the land-owner, to include the expense of a bridge, for the purpose of a farm crossing. Philadelphia, Wilmington, and Baltimore Railway *v.* Trimble, 4 Wharton, 47; s. c. 2 Am. Railw. C. 245.

In the case of Chicago & Rock Island Railway *v.* Ward, 16 Illinois, 522, where the company covenanted to maintain fences upon land intersected by their road, and failed to perform the covenant, and crops were destroyed, it was held the company were liable for the value of the crops growing upon the land and destroyed, as of the time when fit for harvesting. This does not seem entirely in accordance with general principles upon this question. The case professes to go upon the authority of De Wint *v.* Wiltse, 9 Wend. 325. But see § 148, 156.

[5] In the matter of the Rensselaer & Sar. Railway, 4 Paige, R. 553. In Northeastern Railway *v.* Sineath, 8 Rich. 185, it is held that damages are not to be assessed for fencing through uninclosed land, used for grazing. In a recent case in Kentucky, Louisville & Frankfort Railway *v.* Wilton, 14 B. Monr. R. 75, it is held, that where one grants the right of building a railway across his land, neither the land-owner, or the company, are bound to fence adjoining the railway. If the land-owner suffer his cattle to run at large, as he may, if he choose to incur the risk, he cannot recover damages of the company, for any injury sustained by them, unless it might have been avoided, by the agents of the company, with due regard to the safety of the train and its contents. If such cattle, permitted to run at large upon the railway track, are killed, accidentally, by the train, when running at its customary speed, the owner cannot recover of the company.

The court here discountenance the notion, that seems sometimes to have prevailed, that if the railway are in the right, in running their train, and especially where cattle are trespassing upon the track, they may destroy them, at will, without incurring any responsibility. And in regard to the case of New York & Erie Railway *v.* Skinner, 19 Penn. State R. 298, the court say: "This court is not disposed to sanction all the legal doctrines avowed in that opinion."

Railways are only bound to the use of such diligence, prudence, and skill, to avoid injury to cattle, rightfully in the highway at a road-crossing, as prudent

*6. But many of the American cases assume the ground, that where there is no statute imposing the duty of fencing upon the

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men exercise, in the conduct of their own business. And as to cattle wrongfully upon the railway, unless the injury is caused wilfully, or through gross negligence, the company are not liable. Chicago & Mississippi Railway *v.* Patchin, 16 Ill. 198; Great Western Railway *v.* Thompson, 17 Ill. 131; Quimby *v.* Vt. Central Railway, 23 Vt. R. 387; Central Mil. Tr. Railway *v.* Rockafellow, 17 Ill. R. 541; Railroad Co. *v.* Skinner, 19 Penn. St. R. 298.

In a late case in New Hampshire, White *v.* Concord Railway, 10 Foster, 188, it was held, that where the statute required railways to fence and maintain proper cattle-guards, cattle-passes, and farm-crossings, for the convenience and safety of the land-owners along the side of the road, provided they might instead settle with the land-owners therefor, and a railway divides a pasture, and a crossing is made, under the statute, the land-owner may let his cattle run in the pasture, "without a herdsman," and that the company will be liable for their destruction, while crossing the track, from one pasture to the other; unless the injury was caused by accident, or by the fault of the owner; or unless it appear that the company have settled with the owner, in relation to such guards, passes, and farm-crossings.

And it was held also, in the same case, that where the plaintiff deeded the land to the company, upon condition, "said corporation to fence the land and prepare a crossing, with cattle-guards, at the present travelled path, on a level with the track," this was not such settlement, and did not alter the legal relations of the parties.

In this case, both parties being in the right, were bound to the degree of prudence, which is to be expected of prudent men. The railway, knowing of the crossing, and the liability of cattle to be upon it, were bound to keep a look-out, rather than the land-owner to keep some one constantly upon the "look-out."

In the case of Long Island Railway, 3 Edw. Ch. R. 487, the Vice-Chancellor seems to consider, that a railway have no interest in having their road fenced, and are not therefore bound to contribute to the expense of fencing, which is at variance with the opinion of the Chancellor, (4 Paige, 553,) and equally, as it seems to us, with reason and justice. See Campbell *v.* Mosier, 4 Johns. Ch. R. 334.

In a recent case, in the Supreme Court of Pennsylvania, Sullivan *v.* Phila. & R. Railw. 6 Am. Law Reg. 342, the subject of the duty of railway companies to fence their roads, for the security of passengers, is discussed, and, as it seems to us, many sensible and practical suggestions made. The general and correlative duties of passenger carriers and their passengers are thus stated:—

"The carrier's contract with his passenger implies: first, that the latter shall obey the former's reasonable regulations; second, that the carrier shall have his means of transportation complete and in order, and his servants competent.

"If a passenger be hurt without his own fault, this fact raises a presumption of negligence, and casts the *onus* on the carrier.

"This being a presumption of fact, it is for the jury to determine.

"It is no answer to an action by a passenger against the carrier, that the injury

company, and no stipulation, express or implied, between the company and the land-owners, that they shall maintain fences,

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was caused by the negligence, or even trespass, of a third person. The parties are bound by their contract."

Ante, § 149, n. 6 ; § 162.

Woodward, J. : " Whether that spot in the road was not so commonly infested with cows as to require a fence or cattle-guard of some sort; whether the speed of the cars was not too great for a curve, exposed at all times to the incursions of cattle ; whether the engineer discovered the cow as soon as he might, and used his best endeavors to avert the collision—in a word, whether the accident was such as no foresight on the part of the company or its servants could have prevented ; these were questions, and grave ones, too, that ought to have been submitted to the jury.

" The learned judge, after stating correctly the extreme care and vigilance which the law exacts of railroad companies, asks if they are required to provide suitable fences and guards to keep cattle off the road. In answering his question in the negative, the judge seems to have misapplied the reasoning of Judge Gibson in Skinner's case, 7 Harris, 298 ; 1 Am. Law Reg. 97. That was an action by the owner of a cow killed on a railroad, to recover her value from the company ; and the doctrine laid down was that the owner was a wrongdoer in suffering his cow to wander on a road engaged in transporting passengers, and was rather liable for damages than entitled to recover them. The owner of the cow could not insist that the company should fence their road for the protection of his stock. It was his business to keep his cattle within his own bounds. Now, such reasoning between a railway company and a trespasser commends itself to every man's understanding, because it tends to the security of the passenger. If farmers cannot make companies pay for injuring cattle, but they involve themselves in liability for suffering their cattle to run at large, passengers are all the more secure from this kind of obstruction.

" But when, notwithstanding this strong motive for keeping cattle off the road, a cow is found there, and causes an injury to a passenger whom the company have undertaken to carry safely, is it an answer to the passenger suing for damages that the owner of the cow had no right to let her run at large ? Grant that she was unlawfully at large, and grant the owner is bound to indemnify the company for the mischief she caused, yet as between the company and its passenger, liability is to be measured by the terms of their contract.

" Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of the passenger, any more than a defective rail or axle. Whether they maintain an armed police at cross-roads, as is done by similar companies in Europe ; or fence, or place cattle-guards within the bed of their road, or by other contrivance, exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they are bound to respond in damages when injury accrues.

" Perhaps the passenger would have his remedy against the owner of the cow ; it is clear from Skinner's case, that the company would, but the passenger has

they are not bound to do so, but the common-law duty of keeping one's cattle at home rests upon the land-owner.[6] And this view is probably consistent, in principle, with the cases, where such a duty is held to result from the appraisal of land damages, subject to the expense of building fences being borne by the company, or where the assessment specifically includes the expense of fencing, and that has not been paid.

7. And in some of the states, the rule of the common law, in regard to the duty resting upon the owner of domestic animals

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unquestionably a remedy against the company. If he be injured by reason of defective machinery, nobody would think of setting up the liability of the mechanic who furnished the bad work, as a defence for the company against the claim of the passenger. Yet it would be a defence, exactly analogous to that which satisfied the court in this case. We do not wish to be understood as laying down a general rule, that all railroad companies are bound, independently of legislative enactment, to fence their roads from end to end, but we do insist that they are bound to carry passengers safely, or to compensate them in damages. If a road runs through a farmer's pasture grounds, where his cattle are wont to be, possibly, as between the company and the farmer, the latter may be bound to fence, but as between the company and the passenger, the company are bound to see that the cattle are fenced out. If cattle are accustomed to wander on uninclosed grounds, through which the road runs, the company are bound to take notice of this fact, and either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passenger. That is their paramount duty. To enable them to perform it, the law entitles them to a clear track. 7 Harris, 298; 12 ib. 496."

[6] Hurd *v.* Rut. & Bur. Railway, 25 Vt. R. 123; New York & Erie Railway *v.* Skinner, 19 Penn. R. 298; Clark *v.* Syra. & Utica Railway, 11 Barb. 112; Dean *v.* The Sullivan Railway, 2 Foster, 316; A. & S. Railway *v.* Baugh, 14 Ill. 211. Where upon appeal from the first appraisal of land damages, where the erection of fences had been specified, that was vacated, and the new appraisal made no such requirement of the company, it was held that the presumption was, that the whole damages were appraised in money, and the company were not bound to build fences. Morss *v.* Boston & Maine Railway, 2 Cush. 536; Williamson *v.* New York Central Railway, 18 Barb. 222. It seems impossible to estimate damages for taking land for the use of a railway, without taking into the account the expense of fencing. Henry *v.* Pacific Railway, 2 Clarke, 228; Mil. & Mis. Railway *v.* Eble, 4 Chandler, (Wis.) 72; Northeastern Railway *v.* Sineath, 8 Rich. 185; Matter of Rense. & Sar. Railway, 4 Paige, R. 533. And those cases, which hold the company not bound to fence, unless required to do so by statute, or contract, go upon the presumption, that they have already paid the expense of fencing, in the land damages.

to restrain them, has not been adopted, so as to charge the owner with negligence, for suffering them to go at large.[7]

*8. But it is held that where the statute imposes upon the company the duty of maintaining fences and cattle-guards at farm-crossings, and provides that until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages from such defect, that this renders a lessee of the road liable for injury to cattle caused by his operating it without proper cattle-guards at farm-crossings.[8]

9. A general statute requiring fences to be maintained by railways, upon the sides of their road, applies to land acquired by purchase as well as to that taken *in invitum*.[9]

10. And the statute requiring farm-crossings "for the use of proprietors of land adjoining," has no reference to the quantity of land to be accommodated, but only that the crossing must be useful.[9]

11. Where the statute requires the company to erect, at farm-crossings, bars or gates, to prevent cattle, &c. from getting upon the railway, and the land-owner, who is entitled to such protection, refuses to have such bars or gates erected, or requests the

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[7] Kerwhacker *v.* C., C. & Cincinnati Railway, 3 Ohio St. R. 172. In such cases the company are bound to use reasonable care not to injure animals thus rightfully at large. Ib.; C., C. & Cincinnati Railway *v.* Elliott, 4 Ohio St. R. 474. If the owner is to be charged with *remote* negligence in suffering his cattle to go at large, under such circumstances, and the servants of the company are guilty of want of care at the time of the injury, which is the *proximate* cause of it, the company are still liable. Ib.; Chicago & Miss. Railway *v.* Patchin, 16 Ill. R. 198.

[8] Clement *v.* Canfield, 28 Vt. R. 302. An order upon a railway for making farm accommodations, must specify the time within which they shall be made. Keith *v.* The Cheshire Railway, 1 Gray, 614.

[9] Clarke *v.* The Rochester, L. & N. F. Railway, 18 Barb. 350. A fence built in zigzag form of rails, half the length upon the land taken for the railway, and half upon the land of the adjoining proprietor, is a compliance with the statute, requiring the fence to be built upon the side of the road. Ferris *v.* Van Buskirk, 18 Barb. 397. And where the statute provides that, upon certain proceedings, railway companies may be compelled to provide farm-crossings and cattle-passes for the owners of land intersected by the company's road, and no such proceedings have been taken, the company are not liable to an action for damages resulting from the want of necessary farm-crossings and cattle-passes, unless it appears that the company had contracted to build them. Horn *v.* Atlantic & St. Lawrence Railw. 20 Law Rep. 647.

company not to erect them, or undertakes to erect them himself, he cannot maintain an action against the company for not complying with the statute.[10]

12. Railways are not bound to maintain fences upon their roads so as to make them liable to their own servants for injuries happening in consequence of the want of such fences. And where the statute makes them liable for all injuries done to cattle, &c. by *their agents, or instruments, until they fence their road, the liability extends only to the owners of such cattle, or other animals, and this liability is the only one incurred.[11]

13. Where the statute makes railways liable for cattle killed by them, without reference to their negligence, all that is necessary to entitle the party to recover, is to show the fact that the cattle were killed by the company and that he was the owner.[12]

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[10] Tombs *v.* Rochester & Syracuse Railway, 18 Barb. 583. But where the statute requires the commissioners to prescribe the "time when such works are to be made," and the owner has the right, by statute, to recover double damages, "by reason of failure to erect the works," and the commissioners failed to *prescribe the time*, no action will lie. Keith *v.* Cheshire Railway, 1 Gray, 614. When the statute requires fences to be maintained by railway companies, it must be done before they begin running trains. Clark *v.* Vermont & Canada Railway, 28 Vt. R. 103. Since the decision of this case the same court held, that during the construction of a railway, the company, in such case, were bound either by fences or other sufficient means, to protcet the fields of land-owners adjoining the railway. Fitch *v.* Rut. & Bur. Railway, Rutland County, February Term, 1858, Vermont Supreme Court.

[11] Langlois *v.* Buffalo & Rochester Railway, 19 Barb. 364. But in McMillan *v.* Saratoga & Wash. R. 20 Barb. 449, it is conceded the company would have been liable to the representative of their engineer, who was killed by the train running upon cattle, which came upon the track through defect of fences, which it was the duty of the company to maintain, if they had been shown to have had actual knowledge of such defect before the injury. See *ante*, § 165.

[12] Nashville & Ch. Railway *v.* Peacock, 25 Alabama R. 229. See also Williams *v.* New Albany & Salem Railway, 5 Ind. R. 111; Lafayette & Ind. Railway *v.* Shriner, 6 Ind. (Porter,) R. 141. In this case it was held, that such a statute had no reference to the case of cattle killed, at a road-crossing, as that was a place which could not be protected either by fences or cattle-guards.

SECTION II.

AGAINST WHAT CATTLE THE COMPANY IS BOUND TO FENCE.

1. *At common law every owner bound to restrain his own cattle.*
2. *And if bound to fence against others' land, it extends only to those cattle rightfully upon such land.*
3. *Company may agree with land-owner to fence, and this will excuse damage to cattle.*

n. 5. *Review of cases upon this subject.*

§ 167. 1. At common law the proprietor of land was not obliged to fence it. Every man was bound to keep his cattle upon his own premises, and he might do this in any manner he chose.[1]

2. And where by prescription or contract, or by statute, a land proprietor is bound to fence his land from that of the adjoining proprietor, it is only as to cattle rightfully in such adjoining land.[2] The same rule has been extended to railways.[3]

* And it has been considered in some cases that where no statute, in terms, imposes upon railways the duty of fencing their roads, that they are not bound to fence, and that the owner of cattle is bound to keep them off the road, or liable to respond in damages for any injury which may be caused by their straying upon the railway,[4] and as a necessary consequence cannot recover for any damage which may befall them.[5]

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1 Dovaston *v.* Payne, 2 H. Bl. R. 527; Rust *v.* Low, 6 Mass. R. 90, 99; Jackson *v.* Rut. & Bur. Railway, 25 Vt. R. 157, 158; Wells *v.* Howell, 19 Johns. R. 385; Manchester, Sh. & Lincolnsh. Railway *v.* Wallis, 25 Eng. L. & Eq. R. 373; Morse *v.* Rut. & Bur. Railway, 27 Vt. R. 49; Lafayette & Ind. Railway *v.* Shriner, 6 Porter, (Ind.) R. 141; Woolson *v.* Northern Railway, 19 N. H. R. 267. Indianapolis & Cin. Railw. *v.* Kinney, 8 Ind. R. 402.

2 Same cases above; Lord *v.* Wormwood, 29 Maine R. 282.

3 Ricketts *v.* East & West India Docks & Birmingham J. Railway, 12 Eng. L. & Eq. R. 520; Perkins *v.* Eastern Railway Co. 29 Maine R. 307; Towns *v.* Cheshire Railway, 1 Foster, R. 363; Cornwall *v.* Sullivan Railway, 8 Foster, R. 161.

4 Vandegrift *v.* Rediker, 2 Zab. 185; Tonawanda Railway *v.* Munger, 5 Denio, 255; S. C. affirmed in error, 4 Comst. 349; Clark *v.* Syracuse & Utica Railway, 11 Barb. 112; Williams *v.* Mich. Central Railway, 2 Mich. R. 259; New York & Erie Railway *v.* Skinner, 19 Penn. R. 298.

5 Brooks *v.* New York & Erie Railway, 13 Barb. 594. In this case it was held that the statute requiring railways to maintain cattle-guards at road-crossings did

*3. But where a railway is not obliged to fence unless requested by the land-owner, and had agreed with such owner that they should not fence against his land, and a cow placed in such lands strayed upon the track of the road, and was killed by a train, it was held the owner of the cow, having, by his own fault, contributed to the loss, could not recover of the company.[6]

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not extend to farm-crossings. So too it has been held that the statute requiring gates or cattle-guards at road-crossings, does not extend to street-crossings. Vanderkar *v.* Rensselaer & Sara. Railway, 13 Barb. 390. In Central Military Track Railway *v.* Rockafellow, 17 Illinois R. 541, the rule is laid down in regard to cattle straying upon a railway, that they are to be regarded as wrongfully upon the road, and the owner cannot recover for an injury, unless caused by wilful misconduct or gross negligence. The court say, "A railroad company has a right to run its cars upon its track without obstruction, and an animal has no right upon the track without consent of the company, and if suffered to stray there, it is at the risk of the owner of the animal."

And in Illinois Central Railway *v.* Reedy, 17 Illinois R. 580, the same court say, "Animals wandering upon the track of an uninclosed railroad, are strictly trespassers, and the company is not liable for their destruction, unless its servants are guilty of wilful negligence, evincing reckless misconduct." "The burden of proof is on the plaintiff to show negligence, the mere fact the animal was killed" is not enough.

In Munger *v.* Tonawanda Railway, 4 Comst. 349, it is held, that cattle escaping from the inclosure of the owner and straying upon the track of a railway, are to be regarded as trespassers, and no action can be maintained against the company, if the negligence of the plaintiff concurred with that of the company in producing an injury to the cattle while in that situation; and that the law charges the owner of cattle, in such case, with negligence, although his inclosures are kept well fenced, and he is guilty of no actual negligence, in suffering the cattle to escape. And it was accordingly held, that the company was not liable, under such circumstances, for negligently running an engine upon and killing the plaintiff's cattle.

The same principles substantially are maintained in the same case, 5 Denio, 255. And it is further held here, that where the general statutes of the state allow towns to prescribe what shall be a legal fence, and when cattle may run at large in the highway, and which forbid a recovery for a trespass by cattle lawfully in the highway, by one whose fences do not conform to the town ordinance upon the subject, this will have no application to railways, and that cattle, allowed to run in the highway by such ordinance, and which, while so running in the highway, enter upon the lands of a railway, at a road-crossing, where there is no obstruction against the intrusion of cattle, are to be regarded as trespassers.

[6] Tower *v.* Providence and Worcester Railway, 2 Rhode Island R. 404.

*CHAPTER XXII.

LIABILITIES IN REGARD TO AGENTS, SUB-AGENTS, AND CONTRACTORS.

SECTION I.

LIABILITY FOR ACTS AND OMISSIONS OF CONTRACTORS AND THEIR AGENTS.

1. *Company not ordinarily liable for the act of the contractor, or his servant.*
2. *But if the contractor is employed to do the very act, company is liable.*
3. *American courts seem disposed to adopt the same rule.*
4. *Distinction attempted between liability for acts done upon movable and immovable property, not maintainable.*
5. *Cases referred to where true grounds of distinctions are stated.*
6. *No proper ground of distinction, in regard to mode of employment.*
7. *Proper basis of company's liability explained.*

§ 168. 1. The general doctrine seems now firmly established, that the company is not liable for the act of the contractor's servant, where the contractor has an independent control, although subordinate, in some sense, to the general design of the work. The distinction, although but imperfectly defined for a long time, has finally assumed definite form, that one is liable for the act of his servant, but not for that of a contractor, or of the servant of a contractor.[1]

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[1] Laugher *v.* Pointer, 5 B. & C. 547, where the subject is ably discussed, but not decided, the court being equally divided. Quarman *v.* Burnett, 6 M. & W. 499; Milligan *v.* Wedge, 12 Ad. & Ellis, 737; Knight *v.* Fox, 5 Exch. 721; Overton *v.* Freeman, 8 Eng. L. & Eq. R. 479; Peachey *v.* Rowland, 16 Eng. L. & Eq. R. 442; Rapson *v.* Cubitt, 9 M. & W. 710; Reedie *v.* London and N. W. Railway, 6 Railw. C. 184; Hobbitt *v.* Same, 6 Railway C. 188; Steel *v.* Southeastern Railway, 32 Eng. L. & Eq. R. 366, (1855.) In this last case, the action against the company was for flowing the plaintiff's land, by the defective manner in which certain mason work was done, by the workmen of one Furness, who did the work as a contractor under the company, but under the superintendence of one Phillips, the surveyor of the company, who furnished the plans. It appeared that the injury resulted from the workmen not following the directions of Phillips. The court held the action could not be maintained. *Cresswell*, J., said: "If it could have been shown that the plaintiff's land was flooded in consequence of something done by the orders of Phillips, the company's surveyor, it might have been said that was the same as if Phillips had done it with his own hands, and

*2. But if the contractor or his servants do an act which turns out to be illegal, or a violation of the rights of others, and it be the very act which he was employed to do, the employer is liable to an action.[2] Lord *Campbell*, Ch. J., here said, "The position in effect contended for by defendants' counsel, I think wholly untenable, namely, that where there is a contractor, the employer can in no case be made liable. It seems to me, that if the contractor do that which he is ordered to do, it is the act of the employer, and this appears to have been so considered in the cases" [upon the subject]. "In these cases nothing was ordered, except that which the party giving the order had a right to order, and the contract was to do that which was legal, and the employer was held properly not liable for what the contractor did negligently, the relation of master and servant not existing. But here the defendants employ a contractor to do that which was unlawful. Upon the principle contended for, a man might protect himself in the case of a menial servant, by entering into a contract."

3. The American cases have not, as yet perhaps, assumed that definite and uniform line of decision, which seems to obtain in the English courts upon the subject. But there is a marked disposition manifested of late, to adopt substantially the same view.[3] But some of the earlier cases in this country and in England, hold the employer responsible for all the acts and omissions of a contractor, the same as for those of a servant.[4]

4. At one time a distinction was attempted to be maintained, between the liability of the owner of fixed and permanent prop-

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then the company would have been responsible. This work was done under a contract, and there is nothing to show negligence in any one for whose acts the company are responsible." This seems to be placing the matter upon its true basis.

[2] Ellis *v.* The Sheffield Gas Consumers' Co. 22 Eng. Law & Eq. R. 198.

[3] Kelly *v.* Mayor of New York, 1 Kernan, 432; Blake *v.* Ferris, 1 Selden, R. 48; Pack *v.* The Mayor of New York, 4 Selden, R. 222; Hutchinson *v.* York and Newcastle Railway, 6 Railw. C. 580, 589.

[4] Bush *v.* Steinman, 1 B. & P. 404; Lowell *v.* Boston and Lowell Railway, 23 Pick. 24. See also, upon this point, Mayor of New York *v.* Bailey, 2 Denio, 433; Elder *v.* Bemis, 2 Met. 599; Earle *v.* Hall, id. 353. In the latter case the subject is very ably discussed, and the early cases somewhat qualified. And in the case of Hilliard *v.* Richardson, 3 Gray, 349, there is a very elaborate and satisfactory opinion, by Mr. Justice *Thomas*, in which the cases are very extensively reviewed, and the old rule of Bush *v.* Steinman distinctly repudiated.

erty * and the owner of movable chattels, for work done in regard to them, or with them, making the employer liable in the former and not in the latter case.[5] But the distinction was found to rest upon no satisfactory basis, and was subsequently abandoned.[6]

5. The grounds of all the decisions, upon this subject, are fully and satisfactorily explained, in the late cases of Ellis *v.* Gas Consumers Co.,[2] and Steel *v.* Southeastern Railway.[1]

6. Sometimes a distinction has been attempted to be drawn, in regard to the employer, whether the employment were by the job, or by the day, making him liable for the acts of the operatives in the latter and not in the former case. But this is obviously no satisfactory ground, upon which to determine the question, although it might, in point of fact, come very nearly to effecting the same, or a similar separation of the instances, in which the employer is or is not, liable.

7. The true ground of the distinction being, after all, not the form of the employment, or the rule of compensation, but whether the work was done under the immediate control and direction of the employer, so that the operatives were his servants, and not the servants of another, who was himself the undertaker for accomplishing the work, and having a separate, and indepen-

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[5] Rich *v.* Basterfield, 4 C. B. 783; The King *v.* Pedley, 1 Ad. & Ellis, 822. And see Fish *v.* Dodge, 4 Denio, 311. *Littledale*, J., in Laugher *v.* Pointer, 5 B. & C. 547. *Parke*, B., in Quarman *v.* Burnett, 6 M. & W. 510; Randleson *v.* Murray, 8 Ad. & Ellis, 109.

[6] Allen *v.* Hayward, 7 Q. B. 960; Reedie *v.* London and N. W. Railway, 4 Exch. 244. But it is still maintained, by some, that if the owner or occupier of real estate employ workmen under a contract which presupposes the underletting of the work, or the employment of subordinates, and in the course of the accomplishment of the work any thing is done, by digging or suffering rubbish to accumulate, which amounts to a public nuisance, whereby any person suffers special damage, the owner or occupier of the premises is liable. Bush *v.* Steinman, 1 B. & P. 404; Randleson *v.* Murray, 8 Ad. & Ellis, 109. But this rule is questioned. Fish *v.* Dodge, 4 Denio, 311. And after all it seems, like the other phases of the same question, to resolve itself into an inquiry, how far the first employer may fairly be said to have done, or caused to be done, the wrongful act. Burgess *v.* Gray, 1 C. B. 578. If the nuisance occurred naturally, in the ordinary course of doing the work, the occupier is liable; but if it is some irregularity of the contractor, or his servants, he alone is responsible. See Carman *v.* Steubenville and Ind. Railway, 4 Ohio St. R. 399; Thompson *v.* New Orleans & Carrollton Railway, 1 Louis. Ann. R. 178; s. c. 4 id. 262; s. c. 10 id. 403.

dent, and irresponsible control of the operatives, bringing the question again to the same point, the difference between a contractor and a servant.[7]

*SECTION II.

LIABILITY OF THE COMPANY FOR THE ACTS OF THEIR AGENTS AND SERVANTS.

1. *Courts manifest disposition to give such agents a liberal discretion.*
2. *Company liable for torts, committed by agents, in discharge of their duties.*
3. *May be liable for wilful act of servant, in the range of his employment.*
4. *Some of the cases hold it necessary to show the assent of the company.*

n. 6. *Cases upon this subject reviewed.*

5. *Most of the cases adhere to the principle of* respondeat superior.
6. *But it seems not to have been considered, that the company is present.*
7. *The cases seem to regard the company as always absent.*
8. *In cases where the company owe a special duty, the act of the servant is always that of the company.*
9. *It seems more just and reasonable to regard the company as always present, in the person of their agent.*

§ 169. 1. The extent of the liability of railways for the acts of their servants and agents, both negative and positive, seems not very fully settled in many of its incidents. But the disposition of the courts has been to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers.[1]

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[7] In the case of Blackwell *v.* Wiswall, 24 Barb. R. 355, is an elaborate opinion by *Harris*, J., which was affirmed by the full court, which holds that the only ground upon which one man can be made responsible for the wrongful acts of another is, that he should have controlled the conduct of such person. And that the person who is made liable for the acts of another, must stand in the relation of superior.

Hence one who had obtained the exclusive right of a ferry, and who suffered another to operate it for his own benefit, as lessee, is not responsible for any injury inflicted upon passengers, through the negligence or unskilfulness of the servants of the lessee, who conduct the ferry, and it would make no difference if the lessee had been himself conducting the ferry, at the time the injury accrued.

And if it were true that the grantee of the ferry was guilty of a breach of duty, in making the lease, it will not entitle any one to sue on that account, unless he has sustained injury resulting from the act of leasing directly, and not incidentally merely.

[1] Derby *v.* Phil. & Read. Railway, 14 Howard, R. 468, 483; Noyes *v.* Rutland & Burlington Railway, 27 Vt. R. 110. We may suppose the officers and ser-

2. This seems the only construction which will be safe or just, or indeed practicable. It has long been settled, that corporations are liable for torts committed by their agents, in the discharge of the business of their employment, and within the proper range of such employment.[2]

*3. But it has been claimed sometimes, that a corporation is not liable for the wilful wrong of its agents or servants.[3] This opinion seems to rest upon those cases, which have maintained, that the master, whether a natural person, or a corporation, is never liable for the wilful act of his servant.[4] Without stopping here to discuss the soundness of the general principle, as applicable to the relation of master and servant, it must be conceded, we think, that it is not applicable to the case of corporations, and especially such as railways. In regard to such corporations, it seems to us altogether an inadmissible proposition, to excuse them for every act of their servants and agents which is done, or claimed to have been done, positively and wilfully, and which results in an injury to some other party, or proves to be illegal, unless directed, or ratified, by the corporation. Some of the cases seem to disregard any such ground of exemption for the corporation.[5]

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vants of railways to take exorbitant fare and freight, to refuse to permit passengers to have tickets at the fixed rate, or to destroy the life of animals, or of persons, by recklessness, or wantonness, in the discharge of their appropriate duties, and it would be strange if the company were liable in the former case, on account of their special duty as common carriers, and not in the latter, because they owed no duty to the public in that respect. Alabama & Tenn. Rivers Railway *v.* Kidd, 29 Alabama R. 221. But it has been held to make no difference, in regard to the liability of the company for the act of their servant, while acting in the due course of his employment, that he did not follow their instructions, either general or special. Derby *v.* Phil. & Read. Railway, 14 How. U. S. 468, 483. See also Southwick *v.* Estes, 7 Cush. 385.

2 Yarborough *v.* The Bank of England, 16 East, R. 6; Queen *v.* Birmingham & Gloucester Railway, 3 Ad. & Ell. (N. S.) 223; Hay *v.* Cahoes Co. 3 Barb. 42; 2 Aiken's Vt. R. 255, 429; Bloodgood *v.* M. & H. Railway, 18 Wend. 9; Dater *v.* Troy T. & Railway, 2 Hill, 629; Chestnut Hill Turnpike Co. *v.* Rutter, 4 S. & R. 16. They are bound by estoppels *in pais*. Hale *v.* Union Mutual Fire Ins. Co. 32 New H. R. 295.

3 Foster *v.* The Essex Bank, 17 Mass. R. 479, 510; State *v.* Morris & Essex Railway, 3 Zab. 360, 367.

4 M'Manus *v.* Crickett, 1 East, R. 106; Croft *v.* Allison, 4 B. & Ald. 590; Wright *v.* Wilcox, 19 Wend. R. 343.

5 Edwards *v.* The Union Bank of Florida, 1 Florida R. 136; Whiteman *v.* Wilmington & Sus. Railway, 2 Harr. 514.

4. But in some cases it has been held, that the corporation is not liable for the wilful act of its agents, unless done with the assent of the corporation, seeming to imply that if the servant pursue his own whim, or caprice, and act upon his own impulses, the act is his, and not that of the corporation.[6]

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[6] Phil. Germantown & N. Railway *v.* Wilt, 4 Whart. R. 143; Fox *v.* The Northern Liberties, 3 W. & S. R. 103. It has always seemed to us, that the whole class of cases, which hold that the master is not liable for the wilful acts of his servant, has grown up, under a misconception of the case of M'Manus *v.* Crickett, 1 East, R. 106, for they all profess to base themselves upon that case.

That case we apprehend was never intended to decide more than that the master is not liable, in trespass, for the wilful act of the servant. Lord *Kenyon*, Ch. J., in delivering his opinion, in that case, with which the court concur, expressly says, speaking of actions on the case, brought against the master, where the servant negligently did a wrong, in the course of his employment for the master:—

"The form of these actions shows, that where the servant is, in point of law, a trespasser, the master is not liable, as such, though liable to make compensation for the damage consequential from his employing of an unskilful, or negligent servant." "The act of the master is the employment of the servant."

This reasoning certainly applies with the same force to that class of cases, where the act of the servant is both direct and wilful, as where it is only negligent. The master is not liable in either case, perhaps, so much for having impliedly authorized the act, as for having employed an unfaithful servant, who did the injury, in the course of his employment. And whether done negligently, or wilfully, seems to be of no possible moment, as to the liability of the master, the only inquiry being whether it was done in the course of the servant's employment. And the argument, that when the servant acts wilfully, he *ipso facto* leaves the employment of the master, and if he is driving a coach-and-six, or a locomotive and train of cars, thereby acquires a special property in the things, and is, *pro hac vice*, the owner, and doing his own business, may sound plausible enough, perhaps, but we confess it seems to us unsound, although quoted from so ancient a date as Rolle's Abridgment, and adopted by so distinguished a judge as Lord *Kenyon*.

The truth is the whole argument is only a specious fallacy; and whether Lord *Kenyon* intended really to say, that no action will lie against the master, in such case, or only to say, what the case required, that the master is not liable in trespass, it is very obvious the proper distinction, in regard to the master's liability, cannot be made to depend upon the question of the *intention* of the servant. The master has nothing to do, either way, with the purpose and intention of his servants. It is with their acts that he is to be affected, and if these come within the range of their employment, the master is liable, whether the act be a misfeasance, or a nonfeasance, an omission or commission, carelessly or purposely done.

It will happen, doubtless, that when the master is under a positive duty to keep or carry things safely, as a bailee, or to carry persons safely, that while he

*5. Most of the cases, upon the subject of the liability of railways, for the acts of their officers, agents, and servants, have at-

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will be liable, for the mere nonfeasance of the servant, the servant will not be liable to the same party for such nonfeasance, there being no privity between the servant and such party, no duty owing to such person, from the servant. But in such case the servant will be liable for his positive wrongs, and wilful acts of injury, and the master is also liable for these latter acts, but not in trespass, as the servant is ordinarily, but in case.

And so, where the servant goes out of his employment, and does a wrong, as committing an assault by his own hands, upon a stranger, or stealing goods, or any other act, wholly disconnected with his employment, the master is not liable. This is the view taken of this subject by Judge *Reeve*. Dom. Rel. 358, 359, 360, and it is, we think, the only consistent and rational one, and the one which must ultimately prevail.

It is virtually adopted, in regard to corporations, in England. Queen *v.* Great North of England Railway, 9 Q. B. 315, (1846.) Lord *Denman*, Ch. J., said: "It is as easy to charge one person, or a body corporate, with erecting a bar across a public road, as with the non-repair of it, and they may as well be compelled to pay a fine, for the act, as the omission." State *v.* Vermont Central Railway, 27 Vt. R. 103; Maund *v.* The Monmouthshire Canal Co. 4 M. & G. 452, where it is held, that trespass will lie against a corporation for the act of its servant.

This is familiar law in the American courts. And it is not deemed of any importance that the agent should act by any particular form of appointment; and it would be strange if the liability of the corporation could be made to depend upon the *intention* of the agent.

This distinction is not claimed to be of any importance where the company owe a duty, as carriers of freight or passengers, for there the corporation are liable for all the acts of their servants; but for the acts of their servants, in regard to strangers, it has been claimed, there is no liability, where the servant acts wilfully, unless the corporation direct or affirm the act of the servant.

And to this we may assent, in a qualified sense. The corporation does virtually assent to all the acts of its agents and servants, done in the regular course of their employment. A railway or any business corporation exists and acts only by its agents and servants, and by putting them into their places, or suffering them to occupy them, the company consent to be bound by their acts. Thus, a conductor or engineer of a railway, while he acts with the instruments which the company put into his hands to be used on their behalf, upon the line of their road, is acting instead of the corporation, and his acts will bind the corporation, whether done negligently or cautiously, heedlessly or purposely.

It would present a remarkable anomaly upon this subject, to hold the company liable for cattle killed carelessly, upon their track, but not liable when it was done purposely by the engineer, or other servants of the company. It is probably true, that if the engineer should kill cattle, in any way wholly disconnected with his employment, either upon the land of the company, or others, the company could not be made liable; but if the engineer should destroy them wilfully,

*tempted to carry out the analogy of principal and agent, or

by rushing the engine upon them, the company would be liable undoubtedly, if any one were, of which there can be little question. So the company might not be liable if the engineer should drive the engine upon another road and there do damage, when his employment extended to no such transaction.

The case of The Southeastern Railway *v.* The European & Am. Telegraph Co. 24 Eng. L. & Eq. R. 513, (1854,) seems to have adopted, in principle, the view for which we contend. The act here complained of was, boring under the railway, and it was held the company had no right to do so, and that they were liable, *in trespass*, for this unauthorized act of their servants. See also Sinclear *v.* Pearson, 7 New H. 227, opinion of *Parker*, Ch. J.; Phil. & Reading Railway *v.* Derby, 14 How. R. 483, *Grier*, J.; Case of The Druid, 1 Wm. Rob. 391, opinion of Dr. *Lushington*, reviewing the cases.

And we do not very well see why the railway is not liable, to the very same action which the servant would be, because his act is the act of the corporation, within the range of his employment, as running over sheep upon the track, in Sharrod *v.* London & N. W. Railway, 4 Eng. L. & Eq. R. 401, where it is held the action must be case. The distinction between this case and that of the Southeastern Railway *v.* The European & Am. Telegraph Co. is not very obvious, unless we suppose in the latter case a vote of the corporation, which is highly improbable. See Phil. Railway Co. *v.* Wilt, 4 Whart. 143, where it is said the action should be case, and that trespass will not lie, unless the act is done by the command or with the assent of the corporation, which never occurs. Corporations do not vote such acts. A vote of a corporation, that their engineers should run their engines over cattle, would be an anomaly.

In Sleath *v.* Wilson, 9 C. & P. 607, where a servant had been driving his master's carriage, and being directed to return to the stable, or while that was his duty, in the ordinary course of his employment, he went out of his way with the carriage, to do some errand of his own, and drove against a person negligently; it was held that the master was liable, this being the act of the servant, in the course of his employment, because the injury was done with the master's horses and carriage, which he put into the servant's hands.

But here the servant was far more obviously going aside of his employment, than in the supposed cases of his assuming to do a wilful wrong in the direct course of his ordinary employment.

This case certainly cannot stand with the argument of the court, 1 East, 106. And yet is confirmed by other cases. Joel *v.* Morrison, 6 C. & P. 501. Any different view of this subject, will, it seems to us, in principle, bring us back to the earlier theory of the relation of corporations to their servants; that corporations are not liable for torts, committed by their servants, they having no authority to bind the corporation by unlawful acts.

There is an elaborate case in 20 Maine R. 41, State *v.* Great Works Mill Manu. Co. taking precisely the old view of the liability of corporations, for the acts of their servants, where the act proves unlawful. But most of the later cases hold the company liable for the torts of their agents, done in the course of the agency.

master *and servant, as between natural persons, and to apply strictly the principle of *respondeat superior*.[7]

6. But they seem to have lost sight of, or not sufficiently to have considered, one peculiarity of this mode of transportation of freight and passengers, that the superior is virtually always present, in the person of any of the employees, within the range of the employment, as much so, as is practicable in such cases. And this consideration, in regard to natural persons, is held sufficient, *to make the superior always liable for the act of the subordinate, whether done negligently or wilfully.[8]

7. And although the cases seem to treat the superior, as always absent, in the case of injuries done by railways, it is submitted, that the more just and reasonable rule is, to regard the principal, as always present, when the servant acts within the range of his employment.[9]

But the company are not liable for injuries to persons or property, through the recklessness and want of common care and prudence of such persons, or property, as where a slave lay down to sleep upon the track of a railway, and was run over by a train of cars, it not being possible to discover such slave above twenty feet, on account of the grass upon the track. Felder *v.* Railway Co. 2 McMullan, 403.

See also Mitchell *v.* Crassweller, 16 Eng. L. & Eq. R. 448; Leame *v.* Bray, 3 East, R. 593; Claflin *v.* Wilcox, 18 Vt. R. 605, where the principles involved in this inquiry are examined. Smith *v.* Birmingham Gas Co. 1 Ad. & Ell. 526.

In two cases in vol. 24 Conn. R. Crocker *v.* New London, W. & P. Railway, 249, and Thames Steamboat Co. *v.* Housatonic Railway, 40, the general proposition is maintained, that railway companies are not liable for acts done, without the command of the agent, having the superior control, in that department of the company's business, at the time, and out of the range of the particular employment of the servant doing the act. This seems to us a sound and just proposition. See also Giles *v.* Taff Vale Railway, 2 Ell. & Bl. 822; Glover *v.* London & North W. Railway, 5 Exch. 66.

7 Sherman *v.* Rochester, &c. Railway, 15 Barbour, 574, 577; Vanderbilt *v.* Richmond T. Co. 2 Comst. R. 479. In this last case, it was held the company were not liable for the trespass committed by its servants, although directed so to do, by the president and general agent of the company, he having no authority to command an unlawful act. The same rule is laid down in Lloyd *v.* Mayor of New York, 1 Selden, 369; Ross *v.* Madison, 1 Carter, (Ind.) 281.

8 Morse *v.* The Auburn & Sy. Railway Co. 10 Barb. 621; Vandegrift *v.* Railway, 2 N. J. R. 185, 188. See also Burton *v.* Philadelphia, &c. Railway, 4 Harring. (Del.) R. 252.

9 Chandler *v.* Broughton, 1 Crompton & M. 29. In this case it is held, that if the master is present, although passive, he is liable for the wilful act of his servant. M'Laughlin *v.* Pryor, 1 Car. & M. 354.

8. This distinction is of no importance, in regard to the liability of railways, as carriers, of freight and passengers, for then the law makes the company liable absolutely, in one case, and in the other, as far as care and diligence can effect security. Those cases, therefore, which have excused corporations as bailees of goods for hire, when they were purloined by their servants, it would seem are necessarily wrong.[10]

9. But, as railways are, like other corporations, mere entities of the law, inappreciable to sense, we do not see why this abstraction should not be regarded, as always existing and present, in the discharge of its functions. It is indeed a mere fiction, whether we regard the company, as present or absent. And it seems more just and reasonable, that the fiction should not be resorted to, to excuse just responsibility. It is certain we never require proof of any organic action of the corporation, to constitute railways carriers of freight and passengers. All that is required is the fact of their assuming such offices, to create the liability. So too for the most part, in regard to injuries to strangers, and mere torts, it is not expected, that any proof will be given, of any express authority to the servant, or employee, to do the particular act.[11]

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[10] Foster *v.* The Essex Bank, 17 Mass. 479, 510. Trespass will lie against a railway company. Crawfordsville Railway *v.* Wright, 5 Ind. R. 252.

[11] Lowell *v.* Boston & Lowell Railway, 23 Pick. 24. Numerous cases upon the subject of the liability of railways show this practically. Where the company begins to run trains, before condemning the land to their use, it is seldom, that the act of running them is traceable directly to the corporation, except as the act of the employees. This is always done, by design, and never any douht was entertained, that the company are liable, and in trespass, to the land-owner, which could not be the case, upon the strict analogies referred to in note (6,) unless the corporation were regarded as present, and assenting to the act. Hazen *v.* Boston & Maine Railway, 2 Gray, R. 574; Eward *v.* Lawrenceburg & Upper Mis. Railway, 7 Porter, (Ind.) 711; Hall *v.* Pickering, 40 Maine R. 548.

The rule laid down, upon this subject, by Lord *Denman*, Ch. J., in a case, which although a trial at *Nisi Prius*, seems to have been examined, and acquiesced in, by all the judges of K. B., Rex *v.* Medley, 6 C. & P. 292, certainly exhibits the sagacity and wisdom of its author.

That is the case of an indictment against the directors of a gas company, for the act of the company's superintendent and engineer, in conveying the refuse gas into a great public river, whereby the fish are destroyed, and the water rendered unfit for use, &c., thereby creating a public nuisance. No distinction is attempted, or could fairly he made here, between the liability of the company and that of the directors.

*SECTION III.

INJURIES TO SERVANTS, BY NEGLECT OF FELLOW-SERVANTS, AND USE OF MACHINERY.

1. *In general no such cause of action exists against company.*
2. *But if there is any fault in employing unsuitable servants, or machinery, are liable.*
3. *But not liable, for deficiency of help, or for not fencing road.*
4. *Has been questioned whether rule applies to servants of different grades.*
5. *Rule not adopted in some states. Case of slaves. Scotland.*
6. *No implied contract, by ship-owners, that ship is seaworthy.*
7. *But rule does not apply where servant has no connection with the particular work.*
n. 9. *Cases reviewed, in England, Scotland, and America.*

§ 170. 1. It seems to be now perfectly well settled in England, and mostly in this country, that a servant, who is injured by the negligence, or misconduct of his fellow-servant, can maintain no action against the master for such injury.[1]

*2. But it seems to be conceded, that if there be any fault in the selection of the other servants, or in continuing them in their places, after they have proved incompetent, perhaps, or in the employing unsafe machinery, the master will be answerable for all injury to his servants, in consequence.[2]

The court held the directors liable, for an act done, by their superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose was discontinued.

The learned judge uses this significant language, which fully justifies all we contend for: "It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

[1] Priestly *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* York, Newcastle & Berwick Railway, 5 Exch. 343; Wigmore *v.* Jay, 5 Exch. 354; Skip *v.* Eastern Counties Railway, 24 Eng. L. & Eq. R. 396 (1853); Farwell *v.* Bos. & W. Railway, 4 Met. 49; Murray *v.* South C. Railway, 1 McMullan, 385; Brown *v.* Maxwell, 6 Hill, (N. Y.) 592; Coon *v.* Sy. & Utica Railway, 6 Barb. 231; s. c. 1 Selden, 492; Hayes *v.* Western Railway, 3 Cush. 270; Sherman *v.* Roch. & Sy. Railway, 15 Barb. 574; McMillan *v.* Railroad Co. 20 Barb. 449; Honner *v.* The Illinois Central Railway, 15 Ill. R. 550; Ryan *v.* Cumberland Valley Railway, 23 Penn. R. 384; King *v.* Boston & Worcester Railway, 9 Cush. 112; Madison & I. Railway *v.* Bacon, 6 Porter, (Ind.) R. 205. The same rule prevails in Virginia. Hawley *v.* Baltimore & Ohio Railway, 6 Am. Law Reg. 352.

[2] *Shaw*, Ch. J., 4 Met. 49, 57; Keegan *v.* Western Railway, 4 Selden, 175. But

3. But the company are not liable because there was a deficiency of help, at that point.[3] And a neglect in the company to fence their road, whereby the engine was thrown from the track, by coming in contact with cattle, thus enabled to come upon the road, and a servant of the company so injured that he died, will not render them liable.[4]

4. But it has been questioned whether the rule has any just application to servants in different grades, who are subordinated, the one to the other.[5] But as the ground upon which the rule is

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it makes no difference in regard to the liability of the company, that the person came into the service voluntarily, to assist the servants of the company, in a particular emergency, and was killed, by the negligence of some of the servants. Degge *v.* Mid. Railway Co. Court of Exch. Feb. 1857. It is said, McMillan *v.* Saratoga & Wash. R. 20 Barb. 449, that the servant, in order to entitle himself to recover for injuries, from defective machinery, must prove actual notice of such defects in the master. But culpable negligence is sufficient, undoubtedly, and that is such as, under the circumstances, a prudent man would not be guilty of. *Post*, note 10, § 170. But if the servant knew of the defects, and did not inform the master, or if the defects were known to both master and servant, and the servant makes no objection to continue the service, he probably could not recover of the master for any damage in consequence. But if the master knew of the defect, and direct the servant to continue the service, in a prescribed manner, he is responsible for consequences. *Post*, n. 9.

And if the master use reasonable precautions, and efforts, to procure safe and skilful servants, but, without fault, happen to have one in his employ, through whose incompetency damage occurs to a fellow-servant, the master is not liable. Tarrant *v.* Webb, 37 Eng. Law & Eq. 281. In Dynen *v.* Leach, 26 Law J. 221, (April, 1857,) it was decided, that where an injury happens to a servant, in the use of machinery, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is the proximate cause of the injury, the servant cannot recover, nor, if death ensues, can his personal representative recover of the master, there being no evidence of any personal negligence on his part, conducing to the injury. Nor does it vary the case, that the master has in use, in his works, an engine, or machine, less safe than some other, which is in general use, or that there was another and safer mode of doing the business, which had been discarded by his orders.

And in Assop *v.* Yates, 30 Law Times, 290, (in January, 1858,) it was held, that, if the servant knew of the exposure, and consented to continue the service, and suffered damage, he could not recover of the master, for any negligence which might have contributed to the result.

[3] Skip *v.* Eastern Counties Railway, 24 Eng. Law & Eq. R. 396; Hayes *v.* Western Railway, 3 Cush. 270.

[4] Langlois *v.* Buf. & Roch. R. 19 Barb. 364.

[5] *Gardiner*, J., in Coon *v.* Sy. & Utica Railroad Co. 1 Seld. 492; s. c. 6 Barb. 231. But in Gillshannon *v.* Stony Brook Railway, 10 Cush. R. 228, it was held

*attempted to be maintained, is one of policy chiefly, that it is better to throw the hazard upon those in whose power it is to guard against it, it seems very questionable how far any such distinction is maintainable. It has been attempted in a good many cases, but does not seem to have met with favor.

5. And the rule itself has been denied in some cases, in this country, after very elaborate consideration.[6] And it has been held not to apply to the case of slaves,[7] especially where the employer stipulated not to employ them about the engines and cars, unless for necessary purposes of carrying to places where their services were needed, and they were carried beyond that point, and killed in jumping from the cars.[8] The Court of Sessions in Scotland, too, seems to have dissented from the English rule upon this subject.[9]

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to make no difference, that the servants were not in a common employment. This was the case of a laborer riding upon a gravel train to the place of his employment, and injured by the negligence of those in charge of the train.

[6] Little Miami Railway *v.* Stevens, 20 Ohio R. 415; C. C. & C. Railroad Co. *v.* Keary, 3 Ohio State R. 202. These cases are placed mainly upon the ground of the person injured being in a subordinate position. It was held the rule did not apply to day laborers upon a railway, who were not under any obligation to renew their work from day to day, where one, after completing his day's work, was injured through the negligence of the conductor of one of the company's trains, upon which he was returning home, free of charge, but as part of the contract upon which he worked. Russell *v.* Hudson River R. 5 Duer, 39.

[7] Scudder *v.* Woodbridge, 1 Kelly, 195.

[8] Duncan *v.* Railroad Co. 2 Richardson, 613.

[9] Dixon *v.* Ranken, 1 Am. Railw. C. 569. The remarks of Lord *Cockburn* are pointed and pertinent. "The English decisions certainly seem to determine, that in England, where a person is injured, by the culpable negligence of a servant, that servant's master is liable in reparation, provided the injured person was one of the public, but that he is not responsible, if the person so injured happened to be a fellow-workman of the delinquent servant. It is said, as an illustration of this, that if a coachman kills a stranger, by improper driving, the employer of the coachman is liable, but that he is not liable if the coachman only kills the footman. If this be the law of England, I speak of it with all due respect, it most certainly is not the law of Scotland. I defy any industry to produce a single decision or dictum, or institutional indication, or any trace of any authority to this effect, or of this tendency, from the whole range of our law. If any such idea exists in our system, it has, as yet, lurked undetected. It has never been directly condemned, because it has never been stated."

After citing numerous cases in their Reports, where the question was involved, but not raised, his lordship continues: "The new rule seemed to be recommended to us, not only on account of the respect due to the foreign tribunal—the weight of which we all acknowledge—but also on account of its own inherent justice.

*6. But it has been held, that there is no implied obligation on the part of a ship-owner, towards a seaman, who agrees to serve

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This last recommendation fails with me, because I think that the justice of the thing is exactly in the opposite direction. I have rarely come upon any principle, that seems less reconcilable with legal reason. I can conceive some reasonings for exempting the employer from liability altogether, but not one for exempting him only, when those who act for him injure one of themselves. It rather seems to me, that these are the very persons who have the strongest claim upon him for reparation, because they incur danger, on his account, and certainly are not understood, by our law, to come under any engagement to take these risks on themselves."

But the English cases certainly do regard the servant as impliedly stipulating to run these risks, when he enters into the service. The remarks of the learned judge above ought not perhaps to be regarded, as of any inherent weight here, beyond the mere force of the argument, and it is always to be regretted, that any difference of decision should exist among the tribunals of the different states, upon a subject of so much practical moment. The great preponderance of authority in this country, is undoubtedly in favor of the English rule; but we could not forbear to state, that we have always had similar difficulties, to those stated by his lordship, in regard to the justice, or policy of the rule. When these cases go by appeal to the House of Lords, they are determined according to the rule of the Scottish law. Marshall *v.* Stewart, 33 Eng. Law & Eq. R. 1. Opinion of *Cranworth*, Chancellor.

But see the very lucid and convincing argument of *Shaw*, Ch. J., in Farwell *v.* Boston & Wor. Railway, 4 Met. 49, 56; 1 Am. R. C. 339; and the most ingenious attempt, at *reductio ad absurdum*, upon the subject by Lord *Abinger*, Ch. B., in Priestly *v.* Fowler, 3 M. & W. 1, 6, 7, where the learned Ch. B., among other ingenious speculations, supposes some fearful consequences might follow, if the master were to be held liable, for the negligence of the chambermaid, in putting the servant into wet sheets!

If a man should receive damage in any way, by his own foolhardiness, even where a fellow-servant was concerned, in producing the result, he could not recover of any one upon the most obvious grounds. Some discretion and reserve are no doubt requisite, in the application of the rule of the servant's right to recover for the default of his fellow-servant, but whether the difficulty of its application will fairly justify its abandonment, would seem somewhat questionable, if the thing were *res integra*, which it certainly is not, either in the English or American law.

In a recent English case, in the Court of Exchequer, January, 1856, 36 Eng. L. & Eq. R. 486, Wiggett *v.* Fox *et al.*, the court adhere to the rule laid down in former English cases upon this subject, reiterating the same reasons, with the qualification, that if there were any reason for holding that the persons, whose act caused the injury, were not persons of ordinary skill and care, the case would be different, there being an implied obligation, upon the master, not to employ such persons.

With this qualification there seems to be no serious objection to the English

*on board, that the ship is seaworthy, and in the absence of any express warranty to that effect, or of any knowledge of the defect, or any personal blame on the part of the ship-owner, the seaman cannot maintain an action, by reason of the ship becoming leaky, and his being obliged to undergo extra labor.[10]

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rule of law upon this subject. Bassett *v.* Norwich & Nashua Railway, Superior Court of Conn. 19 Law Rep. 551.

In a case in the Court of Sessions in Scotland, so late as January, 1857, the court repelled a plea, founded on the claim that the master is not liable, to a servant, for the negligence of a fellow-servant. The Lord Justice *Clerk* took occasion to remark, that the master's liability rested upon the broad principle, that an employer being liable to third parties, for injuries, caused by his servants, *à fortiori* he is liable to the servant, for injury caused by another servant.

But for injury to servants through obvious or known defects of machinery in the use of the master, the cases all agree that he is liable. McGatrick *v.* Wason, 4 Ohio St. R. 566.

In the Exchequer Chamber, so late as May, 1857, in Roberts *v.* Smith, 29 Law Times, 169, it was held, that where the master directs the conduct of the servant, he is liable for any injury resulting therefrom for the other servants. See also Weyant *v.* N. Y. & Harlaem R. 3 Duer, 360.

It has been held in some cases, Scudder *v.* Woodbridge, 1 Ga. 195, that the rule that the master is not liable for an injury to one servant, inflicted by the want of care, or skill, in a fellow-servant, does not apply to the case of slaves, on account of their want of freedom, in action, and choice, in continuing the service, when it becomes perilous. But if an exception could be founded upon any such basis, it would extend to all the subordinate relations of service, as has sometimes been attempted. But where the injury resulted from the habitual negligence of the engineer of a boat, whereby the slaves perished, by the bursting of a boiler, the master of the boat is liable, and the same rule applies to the case of freemen. Walker *v.* Bolling, 22 Alab. 294; Cook *v.* Parham, 24 Alab. 21. The court here were equally divided upon the question, whether the general rule upon this subject applied to the case of a slave hired on a steamboat.

But this court subsequently held, on general principles, that where one employs a mechanic to repair a building, which is in a ruinous state, but this is not known to the workmen, and not disclosed to the contractor, the employer is liable for all injury sustained by the contractor, or his subordinates, being slaves in this case, by reason of the peril to which they are thus fraudulently exposed, but that he will not be held so liable, if he inform the contractor of the peril to which he is exposed. Perry *v.* Marsh, 25 Alab. R. 659.

[10] Couch *v.* Steel, 24 Eng. L. & Eq. R. 77. But if the master might have known the exposure of the servant, but for his own want of ordinary care, as in the use of a defective locomotive engine, which exploded and injured the servant, through defective construction, the master is liable for the injury. Noyes *v.* Smith, 28 Vt. R. 59. But where the danger is known to the servant and not communicated to the superior, or master, he cannot recover for any injury he may

7. But a carpenter employed by a railway company to build one of their bridges, and who took passage in their cars, by their directions, to go to a certain point, for the purpose of loading timber, to be used in building the bridge, and who was injured in the course of the passage, by the negligent conduct of the train, is entitled to recover of the company, the plaintiff having no particular connection, with the conduct of the business, in which he was injured.[11]

*SECTION IV.

INJURIES BY DEFECTS IN HIGHWAYS, CAUSED BY COMPANY'S WORKS.

1. *Liable for injuries caused by leaving streets in insecure condition.*
2. *Municipalities liable primarily to travellers suffering injury.*
3. *They may recover indemnity of the company.*
4. *Towns liable to indictment. Company liable to mandamus or action.*

§ 171. 1. Where a public company has the right, by law, of taking up the pavement of the street, the workmen they employ are bound to use such care and caution, in doing the work, as will protect the king's subjects, themselves using reasonable care, from injury. And if they so lay the stones, as to give such an appearance of security, as would induce a careful person, using reasonable caution, to tread upon them, as safe, when in fact they are not so, the company will be answerable in damages, for any injury such person may sustain in consequence.[1]

2. But it has been held, that where such companies, having the power, by law, to cut through and alter highways, either temporarily, or permanently, do it in such a manner, as to leave

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sustain in consequence. McMillan *v.* Saratoga & Wash. R. 20 Barb. 449; Hubgh *v.* N. O. & C. Railway, 6 Louis. An. R. 495.

[11] Gillenwater *v.* Mad. & Ind. Railway, 5 Ind. R. 340. And where laborers, upon a railway, were transported to and from their labor and meals, upon the gravel trains of the company, which they were employed in loading and unloading, but had no agency in managing, and in such transportation, by the gross negligence and unskilfulness of the engineer, were injured, it was held the company were liable. Fitzpatrick *v.* New Albany and Salem Railway, 7 Porter, (Ind.) R. 436. But not where the servant is in fault, in attempting to get upon the train when in motion. Timmons *v.* The Central Ohio Railway, 6 Ohio St. R. 105.

[1] Drew *v.* The New River Co., 6 Carr. & P. 754.

them unsafe for travellers, who in consequence, sustain injury, without fault on their part, that the towns, or cities, in which such highways, or public streets, are situated, are primarily liable[2] for all such injuries.

*3. And it is also true that such towns, or cities, may claim an indemnity against the railway companies, who are first in fault, and in such action recover not only the damages, but the costs paid by them, and which were incurred, in the reasonable and necessary defence of actions brought against them on account of the defects in such company's works.[3]

4. And where the statute provides, that railways "shall maintain and keep in repair all bridges, with their abutments, which they shall construct for the purpose of enabling their road to pass over, or under, any road, canal, highway, or other way," and the company omitted to perform the duty, in the manner required, for the public safety, it was held, that the town, within

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[2] Willard *v.* Newbury, 22 Vt. R. 458; Batty *v.* Duxbury, 24 Vt. R. 155; Currier *v.* Lowell, 16 Pick. R. 170; Buffalo *v.* Holloway, 14 Barb. 101. In this last case an opinion is intimated, that a contractor for such works is not liable to make such precautionary erections, as may be requisite to guard the public against injury, no such provision being found in his contract. But is not that a duty which every one owes the public, in all works which he undertakes? In Barber *v.* Essex, 27 Vt. R. 62, the following points are decided: An old highway, which a railway proposes to use for its track, is not considered, as discontinued, till the company have provided a substitute, or unless effected by some other definite legal act, or by an abandonment, by legal authority, or nonuser. Towns are responsible to the public, for the safe condition of their highways, and cannot excuse themselves from the performance of the duty, by showing that a railway company, proceeding under their charter, had caused the defects complained of. The towns are bound to watchfulness upon this subject, and theirs being a primary responsibility, they cannot shift it upon the railway, whose responsibility is secondary, in regard to travellers, and the public generally. The towns have their remedy over against the company. See also to same effect Phillips *v.* Veazie, 40 Maine R. 96.

[3] Lowell *v.* Boston & Lowell Railway, 23 Pick. R. 24; Newbury *v.* Conn. & Pas. Riv. Railway, 26 Vt. R. 751, 752. The recovery in these cases is allowed upon the ground, that the wrong is altogether upon the part of the company, and the town standing primarily liable to the public, for the sufficiency of the highways, and, being virtual guarantors against the negligence of the railway company, may therefore, recover of them an indemnity, not only for the damages they are compelled to pay, but also the costs and expenses incurred by them, in defending *bonâ fide* against suits brought against them for the default of the company. Duxbury *v.* Vt. C. Railway, 26 Vt. R. 751, 752, 753; Hayden *v.* Cabot, 17 Mass. R. 169.

which the road lay, were liable to indictment, for not keeping it in safe repair, and that they may compel the railway company, to make all such repairs, as may be necessary, by writ of mandamus; or, if they have been obliged to make expenditures therein, may reimburse themselves by an action on the case against the company.[4]

*SECTION V.

LIABILITY FOR INJURY IN THE NATURE OF TORTS.

1. *Railway crossings upon a level always dangerous.*
2. *Company not excused, by use of the signals required by statute.*
3. *Party cannot recover, if his own act contributed to injury.*
4. *But company liable still, if they might have avoided the injury.*
5. *If company omit proper signals, not liable, unless that produce the injury.*
6. *Not liable for injury to cattle trespassing, unless guilty of wilful wrong.*
7. *General definitions of company's duty.*
8. *Action accrues from the accruing of the injury.*
9. *Where injury is wanton, jury may give exemplary damages.*

§ 172. 1. We have discussed the subject of this chapter, in general, in former sections.[1] We shall here refer to some cases, where railway companies have been held liable for injuries to persons, in no way connected with them by contract or duty. The subject of railway crossings,[2] on a level with the highway, has been before alluded to, as one demanding the grave consideration of the legislatures of the several states. It causes always a most painful sense of peril, especially where there is any considerable travel upon the highway, and is followed by many painful scenes of mutilation and death, under circumstances, more distressing if possible, than even the accidents, so destructive sometimes, to railway passengers.

2. In a case[3] where the plaintiff was injured at a railway

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4 State *v.* Gorham, 37 Maine R. 451.

1 *Ante*, § 150, 169.

2 *Ante*, § 108.

3 Bradley *v.* Boston & Maine Railway, 2 Cush. 539. Some distinction is made by the judge in trying this case, between those cases of negligence which occur, in long-established modes of business, and the case of the management of railway trains; that in the former case, usage, if uniform and acquiesced in by the public, may amount to a rule of law; but not, in a business so recent, as the management of railway trains. This view seems to be sanctioned, by the Supreme Court, in revising the case. See also Gleason *v.* Briggs, 28 Vt. R. 185; Linfield *v.* Old Colony Railway, 10 Cush. 562.

crossing, by the collision of an engine, it was held that where the statute required, at such points, certain specified signals, the compliance with the requirements of the statute will not excuse the company, from the use of care and prudence, in other respects. That it is not necessarily enough to excuse the company, that they pursued the usual course, adopted by engineers, in such cases. The question of negligence is one of fact, in such cases, to be *submitted to the jury, under all the circumstances of the case, and to be determined, by them, upon their view of what prudence and skill required.

3. But when the statute requires certain precautions against accidents, and its requirements are disregarded, the party suffering damage is not entitled to recover, if he was himself guilty of negligence, which contributed to the damage.[4]

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[4] Parker *v.* Adams, 12 Met. R. 415; *Ante*, § 150; Macon & W. Railway *v.* Davis, 18 Georgia R. 679, where the question of negligence in the conductors of a railway train in passing a road-crossing, is held to be one of fact depending upon the circumstances of each particular case.

In an important case, Shaw *v.* Boston & Worcester Railway, twice reported in 5 Gray R. the subject of injuries, at railway and highway intersections, is a good deal discussed, and although the court were not entirely agreed, in all the questions involved, the following points were decided in addition to what is stated. *Ante*, § 152, n. 9.

That it should appear, that the injury was not produced, in whole or in part, by plaintiff, or the driver's want of acquaintance with the highway, and the point of intersection, between that and the railway, the collision having occurred in the night time. In other words, that it is such want of care and prudence, for one unacquainted with a highway, which is intersected by a railway on a level, to attempt to pass in the night time, as to preclude his recovery against the railway, for any damage sustained, in whole, or in part, through such want of knowledge of the localities, although the agents of the company are shown to have been guilty of want of care, which also contributed to the injury.

That in passing such an intersection, it is for the jury to say, whether, under all the circumstances, it was the duty of the traveller to stop and listen, and look both ways, "to ascertain, by both senses, whether a train was within sight or hearing," and if they so regard it, and the want of this precaution contributed directly to the injury sustained, the plaintiff cannot recover, even if the company were in like fault on their part.

That the jury were to inquire, upon the question of negligence in the company, whether they had complied with all such statutory, and other reasonable precautions, for the safety of travellers at the point, as would have had a tendency to ensure the plaintiff's security, in the particular circumstances of his case; and whether "in the management of their train, they were running with such reasonable speed as would be proper and suitable on approaching a highway."

4. If the plaintiff's negligence did not contribute to his injury, it will not preclude his recovering for the consequences of defendant's wrong.[5] If the wrong on the part of the defendant is so

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That it was also a proper inquiry, whether the horse was "reasonably safe and manageable, and fit to be used on the highway." If not, and the injury occurred in consequence, and the plaintiff knew of the defects in the habits of the animal, he could not recover, even if defendants were in fault. And that the jury were also to inquire, whether the driver "could by ordinary care [and skill] have checked the animal and prevented his running upon the track" of the railway, after he became frightened. That upon this point, the inquiry, as to the conduct of those in charge of the train, was whether they did any thing out of the common course of prudent and safe management of the train, or omitted to do any thing which they should have done, and which "had a tendency to frighten the horse in the first instance, or bring the engine in contact with him" at the point of collision.

[5] Kennard *v.* Burton, 25 Maine R. 39. In the newspaper report of a recent trial in the Supreme Court of Pennsylvania, the court are reported to have charged the jury, as matter of law, that "a person about to cross a railway track [with a team,] is in duty bound to stop and look in both directions, and listen before crossing." It has recently been decided by the full bench Supreme Court in Massachusetts, *ante*, n. 4, that it is not competent for the judge to lay down any definite rule, as to the duty of the company, in regard to proper precautions in crossing highways; that the circumstances attending such crossings are so infinitely diversified, that it must be left to the jury to determine, what is proper care and diligence in each particular case. This we apprehend is the true rule upon that subject, both as to the company and travellers upon the highway, and that it will finally prevail, notwithstanding occasional attempts to simplify the matter by definitions. The Pennsylvania case referred to is that of O'Brien *v.* Philadelphia, Wilmington, & Baltimore Railway, 10 Am. Railw. T. No. 10, 13. The following extracts from the charge to the jury, may serve to explain the views of the court.

But if the jury find that the company were not faultless, that they did or omitted any thing that would constitute negligence as I have defined it, the next inquiry will relate to the conduct of the plaintiff.

He was a carter, and the same general principles apply to him as to the defendants. He was bound to pursue his business with all that regard to the safety of himself and others which prudent men commonly employ in like occupations. Did he demean himself in that manner? In answer to the 6th and 7th points on the part of the defendants, I instruct the jury that a carter, or any man having charge of a team, who is about to cross a railroad at grade on which locomotives run, is bound to stop and listen, and look in both directions, before he permits his team to set foot within the rails, and omission to do so is negligence on his part. This rule of law is demanded by a due regard to the safety of life and property, both his own and that which is passing on the railroad. From the diagram in evidence it is perfectly apparent that the plaintiff could have seen the approaching train if he had looked. If he saw it, it was extreme rashness in him

wanton and gross, as to imply a willingness to inflict the injury, plaintiff may recover, notwithstanding his own ordinary neglect.[6] And this is always to be attributed to defendant, if he might have avoided injuring plaintiff, notwithstanding his own negligence. So, too, if the neglect on the part of the plaintiff is not the proximate cause of the injury, it will not preclude a recovery.[7]

5. If a railway wholly omit to give the proper signal at a road-crossing, they are not necessarily liable for injury to one crossing at that moment, whose team took fright and injury ensued. It should be shown that the omission had some tendency to produce the loss.[8]

6. A conductor was held not liable for running the engine over an animal trespassing upon the track, unless he acted wilfully.[9] So, too, where the train passed over slaves asleep upon the track, the company were held not liable.[10]

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to allow his lead horse to advance so far, and if he did not see it, it must have been because he did not look.

I state the general rule, but whether it is applicable to the plaintiff in the circumstances which surrounded him is for the jury. A few yards on his right, some witnesses think seventy, there was a gravel train, with a locomotive attached, standing on one of the tracks, and liable to start any moment, and on his left, according to his witnesses, was the omnibus in close proximity to the crossing.

Now, for these circumstances the plaintiff was in no wise responsible, and the question is, whether they constituted any excuse for his not looking up the road."

6 Wynn *v.* Allard, 5 Watts & Serg. 524; Kerwhacker *v.* C. C. & Cincinnati Railway, 3 Ohio State R. 172, 188.

7 Trow *v.* Vermont Central Railway, 24 Vt. R. 487.

8 Galena & Ch. Railway *v.* Loomis, 13 Illinois R. 548. A railway is not liable for an injury which happens in crossing a railway, in consequence of the stationary cars of the company, upon their track, obstructing the view of the plaintiff in his approach to the road. Burton *v.* The Railway Co. 4 Harr. 252. See also Morrison *v.* Steam Nav. Co. 20 Eng. L. & Eq. R. 267, 455.

9 Vandegrift *v.* Rediker, 2 Zab. 185. But where the act is wrongful, the action may be against both the engineer and firemen. Suydam *v.* Moore, 8 Barb. 358.

10 Herring *v.* Wil. & R. Railway, 10 Iredell, 402. In this case, it is held that the conductor might not be chargeable with the same degree of culpability in driving his train over a rational creature, or one who seemed to be such, and in the exercise of his faculties, as in doing the same when the obstruction was a brute animal. And in the case of running over a person asleep, or a deaf mute, or an insane person, some indulgence is, doubtless, to be extended, inasmuch as the peculiar state of the person might not be readily discoverable by those in charge of the train, and, if not they would have a right to calculate that

*7. The duty required of railways towards those who are, at the time, in the exercise of their legal rights, is the possession of the most approved machinery, and such care, diligence, and skill, in using it, as skilful, prudent, and discreet persons would be expected to put forth, having a proper regard to the interests of the company, the demands of the public, and the interests of those having property along the road, exposed to fire, and to injury in *other modes.[11] They are, at least, bound to exercise as much care as if they owned the property along the line, i. e., what

they would conduct like other rational beings, and step off the track, as the engine approaches.

The practice of allowing persons to walk upon a railway track is a vicious one, and one which would not be tolerated, in any state or country where the railways are under proper surveillance and police. But as it now is in many parts of this country, an engineer will find some person upon his track, every mile, and, in some places, every few rods. If he were required to check the train, at every such occurrence, it would become an intolerable grievance. If men will insist upon any thing so absurd as to be permitted to walk upon a railway track at will, they must expect that those who are bereft of sense, but preserve the form of humanity, when they chance to come into the same peril, will perish; not so much from their own infirmities, as from the absurd practices of those who have no such infirmities. And their destruction is not so much attributable, perhaps, to the fault of the railways, as to the bad taste, and lawlessness of public opinion, in making such absurd demands upon the indulgence of railways. And, if it be urged that the companies might enforce their rights, and keep people off their tracks, it would be found, we fear, upon trial, that such arguments are unsound. The companies, probably, could not enforce such a regulation, in many parts of the country, without exciting a perplexing and painful prejudice, to such an extent, as to endanger the safety of their business. The only effectual remedy will be found in making the act punishable by fine and imprisonment, as is done in England and some of the American states, and in a strict enforcement of the law upon all offenders. Every one can see that, if sane persons were excluded from the railway, the sight of a person upon the track would, at once, arrest the attention of conductors of trains, and there would be little danger comparatively of their destruction, whereas now, persons bereft of sense are almost sure to be run over.

Persons are so frequently upon the track, that the conductors have no alternative but to push their trains upon them. For such persons are, not unfrequently, so reckless, that, if they could alarm engineers, they would be found trying such experiments, every hour.

One who was engaged in sawing wood upon the track of a railway, by direction of the superintendent of the company, and is injured, by the engine of another company, lawfully upon the track, cannot recover of the latter company, although their engineer was guilty of carelessness, being himself, also, in fault. Railroad *v.* Norton, 24 Penn. R. 465.

[11] Baltimore & Susq. Railway *v.* Woodruff, 4 Maryland R. 257.

would be regarded as the duty of a prudent owner under all the circumstances.[12]

8. The general rule, in regard to the time of the accruing of the action is, that when the act, or omission causes direct and immediate injury, the action accrues from the time of doing the act, but where the act is injurious only, from its consequences, as by undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury.[13]

9. As a general rule, in the English practice, and in most of the states of the Union, in actions for torts, where the defendant's conduct has been wanton, or the result of malice, the jury are allowed to give damages of an exemplary character, and the term vindictive even, is sometimes used.[14] But this is questioned by some writers, and in many cases.[15]

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[12] Quimby *v.* Vermont Central Railway, 23 Vt. R. 387. And where one was injured by the company's train, at a road-crossing, by collision between the company's locomotive and the carriage in which the plaintiff was riding, it was held, that the carelessness of the driver of the carriage cannot be shown by common reputation. And it is also here decided that the occupation of the plaintiff, and means of earning support, cannot be shown, with a view to enhance the damages, for such an injury, unless specially averred in the declaration. Baldwin *v.* Western Railway, 4 Gray, 333. In O'Brien *v.* Philadelphia, Wilmington, & Baltimore Railw. 10 Am. Railw. Times, No. 13, where plaintiff was injured at a railway crossing a highway, by collision with his team, Mr. Justice *Woodward* of the Pennsylvania Supreme Court charged the jury, that the plaintiff was only entitled to compensatory damages, there being no pretence of any intentional wrong, or flagrant rashness, on the part of the agents of the company.

[13] Roberts *v.* Read, 16 East, R. 215. Where the act complained of was maliciously opposing plaintiff's discharge as an insolvent, and the act was more than six years before action brought, but the consequent imprisonment continued within the six years, it was held the cause of action was barred. Violet *v.* Simpson, 30 Law Times, 114, Nov. 1857.

The admissions of the corporators, or of the president, are not sufficient to remove the bar of the statute of limitations, in favor of a private corporation. Lyman *v.* Norwich University, 28 Vt. R. 560.

[14] Sedgwick on Dam. 38, 98, 454; *ante*, § 131, 154. In the case of Shaw *v.* Boston & Worcester Railway, *ante*, n. 4, where the plaintiff's husband was killed, by the same collision, and she was shown to have had a family of young children, and to be without sufficient property for their support, it was held to be error in the court not to charge the jury, when specially requested so to do, that these facts could not be considered by them, in estimating damages.

[15] Appendix to Sedgwick on Dam. 609; Varillat *v.* New Orleans & Car. Railway, 10 Louisiana Ann. R. 88.

SECTION VI.

MISCONDUCT OF RAILWAY OPERATIVES SHOWN BY EXPERTS.

1. *The management of a train of cars is so far matter of science, and art, that it is proper to receive the testimony of experts.*
2. *In cases of alleged torts company not bound to exculpate.*
3. *So, too, the plaintiff is not bound to produce testimony from experts.*
4. *The jury are the final judges in such cases. But omission to produce testimony of experts will often require explanation.*
5. *General rules of law in regard to the testimony of experts.*

§ 173. 1. The conduct of a railway train is not strictly matter of science perhaps. Its laws are not so far defined, and so exempt *from variation, as to be capable of perfect knowledge, like those of botany and geology, and other similar sciences, or even those of medicine and surgery perhaps, whose laws are subject to more variation.[1] But they are nevertheless, so far matters of skill and experience, and are so little understood, by the community generally, that the testimony of inexperienced persons, in regard to the conduct of a train, on a particular occasion, or under particular circumstances, would be worthy of very little reliance. They might doubtless testify, in regard to what they saw, and what appeared to be the conduct of the operatives, but those skilled in such matters might, as experts in other cases are allowed to do, express an opinion, in regard to the conduct of the train, as shown by the other witnesses, and how far it was according to the rules of careful and prudent management, and what more might, or should have been done, consistently with the safety of the train, in the particular emergency.[2]

2. But a railway company, when sued for misconduct, are not bound, in the first instance, ordinarily, to show, by the testimony of experts, that they were guilty of no mismanagement. But in the case of an injury to passengers, the rule is otherwise.[3]

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[1] Quimby *v.* Vermont Central Railway, 23 Vt. R. 394, 395.

[2] Illinois Central Railway *v* Reedy, 17 Illinois R. 580, 583. *Caton*, J. "The burden of proof is on the plaintiff, and it is for him to show, by facts and circumstances, and by those acquainted with the management of trains, who could speak understandingly on the subject, that it was practicable and easy to have avoided the collision, and that in not doing so, those in charge of the train, were guilty of that measure of carelessness, or wilful misconduct, which the law requires to establish the liability."

[3] *Ante*, § 149; Galena and Chicago Railway *v.* Yarwood, 17 Illinois R. 509.

3. And it has been said, that one, who brings an action against a railway, founded upon negligence and misconduct, is not bound, in opening his case to show, that by the laws and practice of railway companies, there was mismanagement in the particular case. If he sees fit to trust that question to the good-sense of the jury, he may.[4]

4. But it is obvious, that in cases of this kind, although the jury are ultimately to determine, upon such light, as they can obtain, and will be governed a good deal by general principles of reason, based upon experience, and that the testimony of witnesses, unskilled in the particular craft, will doubtless have a considerable influence, in establishing certain remote principles, by which all men must be governed, in extreme cases, nevertheless, in that numerous class of cases, in courts of justice, which have to be determined *upon a nice estimate and balance of conflicting testimony, the opinion of experienced men, in the particular business, must be of very controlling influence. And it is very well understood, that generally, the fact that such evidence is not produced, unless the omission is explained, will tend to raise a presumption against the party.[5]

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[4] Quimby *v.* Vermont Central Railway, 23 Vt. R. 394, 395.

[5] Murray *v.* Railroad Company, 10 Rich. (S. C.) R. 227. As we find few cases in the books bearing upon this general question, in regard to railways, we may refer to analogous subjects where the question has arisen. Nautical men may testify their opinion, whether upon the facts proved by the plaintiff, the collision of two ships could have been avoided, by proper care on the part of defendants' servants. Fenwick *v.* Bell, 1 C. & K. 312. So, too, in regard to the proper stowage of a cargo. Price *v.* Powell, 3 Comst. 322. So a master, engineer, and builder of steamboats, may testify his opinion, upon the facts proved, as to the manner of a collision. The Clipper *v.* Logan, 18 Ohio, 375; Sills *v.* Brown, 9 C. & P. 601.

It has been held, that even experts may not be called to express an opinion, whether there was misconduct in the particular case on trial, as that is the province of the jury, but that they may express their opinion upon a precisely similar case, hypothetically stated, which seems to be a very nice distinction, and which is combated in a very sensible note to Fenwick *v.* Bell, 47 Eng. Com. Law R. 312. The opinion of Lord *Ellenborough*, in Beckwith *v.* Sydebotham, 1 Camp. 116, 117, that where there is a matter of skill or science, to be decided, the jury may be assisted, by the opinion of those peculiarly acquainted with it, from their professions and pursuits, seems to us more just and wise.

We have always regarded the testimony of experts, as a sort of education of the jury, upon subjects, in regard to which they are not presumed to be properly instructed. The distinction we make upon the subjects, where we allow the

* CHAPTER XXIII.

RAILWAY DIRECTORS.

SECTION I.

EXTENT OF THE AUTHORITY OF RAILWAY DIRECTORS.

1. *Notice to one director, if express, sufficient.*
2. *Applications to the legislature for enlarged powers, and sale of company's works, require consent of shareholders.*
3. *Constitutional requisites must be strictly followed.*
4. *Directors, or shareholders, cannot alter the fundamental business of the company.*
5. *Inherent difficulty of defining the proper limits of railway enterprise.*

n. 7. *Opinion of Lord Langdale, and review of cases, on this subject.*

§ 174. 1. We have before stated in general terms, the power of the directors of the company to bind them.[1] The board of directors ordinarily may do any act, in the general range of its business which the company can do, unless restrained, by the

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testimony of experts, and where we do not, shows this. The nearer the testimony comes to the very case in hand, the more pertinent and useful. And the finesse of keeping the very case out of sight, by name, but describing it, by allegory, in asking the opinion of the experts, is scarcely equalled by the device of certain species of birds, who imagine themselves invisible to others, because they are so to themselves. It is not unlike asking a witness, in regard to the genuineness of handwriting, in dispute before a jury, and which is to be determined by them, and this is always allowed without question. And in all such questions, there is likely to be so much disagreement among the experts, as to leave the jury a sufficient duty to perform. But the more common practice is according to the rule in Sills *v.* Brown.

In an action against a railway company for carrying their road through plaintiff's pasture, throwing down his fences, and scattering, frightening, and injuring his cattle, it was held that an experienced grazier is competent to testify as an expert, in regard to the state of cattle and to causes affecting their weight and health on a supposed state of facts. But that such person could not express an opinion upon the facts proved in the particular case, on the point to be determined by the jury. Baltimore & Ohio Railw. *v.* Thompson, 10 Md. R. 76.

In Webb *v.* Manchester and Leeds Railway, 1 Railw. C. 576, a point, involving questions of practical science being in dispute, and the testimony conflicting, it was referred to an engineer for his opinion, and his conclusion, in regard to the facts, adopted and made the basis of the order of court.

[1] *Ante*, § 113, 137.

charter and by-laws.[2] Notice to one of a board of directors, in the same transaction, or express notice, is, in general, notice to the company. But the fact, that one of a firm, is a director in a banking company, but takes no active part in the business of the bank, is no notice * to such bank of the dissolution of such partnership, or the retiring of one of its partners.[3]

2. But it is said the directors of a corporation have no authority without a vote of the shareholders, to apply to the legislature for an enlargement of the corporate powers.[4] And it was held, that the managing directors of a joint-stock company, who had power to lease the works of the company, could not, in the lease, give an option to the lessee, to purchase, or not, at a price fixed, the entire works of the company, at any time within twenty years, and that such a contract must be ratified, by every member of the company, to become binding upon them.[5]

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[2] Whitwell, Bond & Co. *v.* Warner, 20 Vt. R. 425. But the general agent of such a company, who performs the daily routine of the business of the company, cannot bind them beyond the scope of his ordinary duties. Hence the law agent of a joint-stock insurance company cannot bind the company by his false representations as to the state of its finances. Burnes *v.* Pennell, 2 H. L. Cas., Clark & F. (N. S.) 497. But where the directors of the company make such false representations, as to the state of the finances of the company, to enhance the price of stocks, they are liable to an action, at the suit of the person deceived, or to criminal prosecution; and transfers of stock made upon the faith of such representations, will be set aside in equity. Id. Lord *Campbell* said, it was not necessary the representation should have been made personally to the plaintiff. See also Soper *v.* Buffalo & Roch. Railway, 19 Barb. 310.

But where the charter of a railway company, or the general laws of the state, require the ratification of a particular contract, by a meeting of the shareholders, held in a prescribed manner, such contract, assumed by the directors only, does not bind the company, and a court of equity will not hesitate to enjoin its performance by the company, at the suit of any dissenting shareholder. Zabriskie *v.* C. C. & C. Railw. 10 Am. Railway Times, No. 15.

Where a tariff of fares of freight and passengers upon a railway are established and posted up by the president of the company, and are acted upon in transacting the business of the company, without objection, the consent of the corporation will be presumed. Hilliard *v.* Goold, 34 New H. R. 230.

[3] Powles *v.* Page, 3 C. B. 16. But the secretary of a railway company cannot bind the company by admissions. Bell *v.* London & N. W. Railway, 21 Eng. L. & Eq. R. 566. Nor can the directors bind the company by their declarations, unless connected with their acts, as part of the *res gestæ*. Soper *v.* Buffalo & Roch. Railway, 19 Barb. 310.

[4] Marlborough Manufacturing Co. *v.* Smith, 2 Conn. R. 579.

[5] Clay *v.* Rufford, 19 Eng. L. & Eq. R. 350.

3. And where the deed of a joint-stock company enables the majority to bind the company, by a resolution passed in a certain manner, these formalities must be strictly complied with, or the minority will not be bound by the act.[6]

4. So, too, where the directors, or even a majority of the shareholders, assume to enter into a contract, beyond the legitimate scope of the objects and purpose of the incorporation, the contract is not binding upon the company, and any shareholder may restrain such parties by injunction out of chancery, from applying the funds of the company to such purpose, however beneficial it may promise to become to the interests of the company. This is a subject of vast concern to the public, considering the large amount invested in railways, and the uncontrollable disposition, which seems almost everywhere to exist, in the utmost good faith, no doubt, to improve the business of such companies, by extending the lines of communication, and even by the virtual purchase of other extensive works, more or less nearly connected, either in fact, or in apprehension, with the proper business of the company.

5. There can be no doubt the courts of equity hold some rightful control over these speculative schemes and enterprises. But *they lie so deeply entrenched, in the general spirit of the age, and receive so much countenance and sympathy from kindred enterprises, in almost all the departments of business, that it often becomes extremely difficult, if not impossible, to fix any well-defined and practicable limits, to the operations of railway companies, that shall not allow them, on the one hand, the power of indefinite extension, and overwhelming absorption of kindred

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[6] *Ex parte* Johnson, 31 Eng. L. & Eq. 430. One railway company cannot, without the permission of parliament, purchase stock in other railway companies. Salomons *v.* Laing, 6 Railw. C. 289.

In the case of Ernest *v.* Nichols, 30 Law Times, 45, decided in the House of Lords, in August, 1857, the subject of the power of the directors of a joint-stock company, to bind the company, is discussed very much at length, and the conclusion reached, as in some former cases, (Ridley *v.* Kingsbridge Flour Mill Baking Co. 2 Exch. 711, and some others,) that the directors could execute no binding contract, on behalf of the company, except in strict conformity to the deed of settlement by which the company was constituted; and that it was no excuse for the other contracting party, to say, he was ignorant of the provisions of that deed. It was his folly to contract with a director, or directors, under such ignorance, and he must be content to look to those with whom he contracted.

enterprises, or which will not be regarded, on the other, as a denial of fair liberty and free scope, to carry out the just objects of their creation. We have thought, that we could not afford a more just, and unexceptionable commentary, upon this difficult and important subject, than in the language of one of the most sober, discreet, and learned of the English equity judges, Lord *Langdale*, M. R.[7]

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[7] Colman *v.* The Eastern Counties Railway Co. 4 Railw. C. 513. The managing directors of a railway company, with the view of increasing the traffic on their line, entered into a contract with a steam-packet company, that they would guarantee the proprietors of the steam-packet company a minimum dividend of £5 per cent. on their paid-up capital, until the company should be dissolved, and that, upon a dissolution, the whole paid-up capital should be returned to the shareholders, in exchange for a transfer of the assets and properties of the steam-packet company.

One of the shareholders filed a bill, on behalf of himself and all other shareholders who should contribute, except the directors, against the company and the directors, and obtained an injunction, *ex parte*, to restrain the completion of the contract:—

Held, on motion to dissolve the injunction, that an objection for want of parties, to a suit so framed, was not sustainable. That directors have no right to enter into or to pledge the funds of the company in support of any project, not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. That acquiescence by shareholders in a project for however long a period, affords no presumption that such project is legal.

That an objection, stated by affidavit, and remaining unanswered, that the plaintiff was proceeding at the instigation and request of a rival company, did not deprive him of his right to an injunction, and the motion to dissolve the injunction was refused, with costs.

The learned judge said: "To look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships may be, would, I think, be greatly to mistake the functions which they perform, and the powers of interference which they exercise with the public and private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit, which, notwithstanding all other sacrifices, is on the whole hoped to be obtained by the public; but the public interest being to protect the private rights of all individuals, and to save them from liabilities beyond those, which the powers given by the several acts necessarily occasion, those private rights must always be carefully looked to.

"I am clearly of opinion, that the powers given by an act of parliament like that which is now in question, extend no further than expressly stated in the act, except where they are necessarily and properly acquired for the purposes which the act has sanctioned. How far those powers may extend which are necessarily

*SECTION II.

WHEN DIRECTORS BECOME PERSONALLY LIABLE.

1. *Not liable personally, for any lawful act done as directors.*
2. *But are liable upon express undertaking, to be personally holden.*
3. *Are liable personally, if they assume to go beyond their powers.*
4. *Extent of powers affected often, by usage and course of business.*
5. *But if contract is beyond the power of company, or not in usual form, directors personally liable.*
6. *Statement of case illustrating last point.*

§ 175. 1. The English statute enacts, what was the common law indeed, that no director should become personally liable by

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or conveniently to be exercised for the purposes intended by the act, will very often be a subject of great difficulty. We cannot always ascertain what they are; ample powers are given for the purpose of constructing the railway; ample powers are given for the purpose of maintaining the railway; ample powers are also given for the purpose of doing all those things which are required for the proper use of the railway; but I apprehend that it has nowhere been stated that railway companies have power to enter into transactions of all sorts and to any extent. Indeed it is admitted, and very properly admitted, that they have not a right to enter into new trades and new businesses not pointed out by the act; but, it is contended, that they have a right to pledge the funds of the company without any limit, for the encouragement of other transactions, however various and extensive, provided only they profess that the object of the liability occasioned to their own shareholders by such encouragement, is to increase the traffic upon the railway, and thereby the profit to the shareholders. Surely that has nowhere been stated; there is no authority for any thing of that kind. What has been stated is, that these things to a small extent have frequently been done since the establishment of railways. Be it so; but unless what has been done can be proved to be in conformity with the powers given by the special acts of parliament, they do not in my opinion furnish any authority whatever. To suppose that the acquiescence of railway shareholders for the last fifteen years, in any transaction conducted by a railway company, is any evidence whatever of their having a lawful right to enter into it, is, I think, wholly to forget the frenzy in which the country has been for the last fifteen or sixteen years, or thereabout. There is no project, however wild, which has not been encouraged by some one or more of these companies. There is no project, however wild, which the shareholders, or the persons liable in respect of those companies, have not acquiesced in, from one cause or another, either from cupidity and the hope of gaining extraordinary profits beyond their first anticipations, or from terror of entering into a contest with persons so powerful. In the absence of legal decisions, I look upon the acquiescence of shareholders in these transactions as affording no ground whatever for the presumption that they may be in themselves legal."

The case was afterwards mentioned to the court, on behalf of the defendants,

*reason of any contract made, or any act done, on behalf of the company, within the scope of the authority conferred by the

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when his lordship stated, that the injunction was only meant to refer to the guaranty proposed to be given, and the case made by the bill; but was not intended to affect any arrangement which the directors might enter into with any steam-packet company respecting the rates and tolls to be charged on the railway.

In Salomons *v.* Laing, the same learned judge said (6 Railw. C. 301): "A railway company, incorporated by act of parliament, is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act of parliament, and not for any other purpose whatever. When the expenses are paid, and the public purposes directed and provided for by the act of parliament,—which, in truth, was the motive and inducement for granting the extraordinary powers given by all these acts of parliament,—when these purposes are fully performed, any surplus which may remain after setting apart the sum to answer contingencies, may, if not applied in enlarging, improving, or repairing the works, be divided among the shareholders. The dividends, which belong to the shareholders, and are divisible among them, may be applied by them severally as their own property, but the company itself, or the directors, or any number of the shareholders assembled at a meeting or otherwise, have no right to dispose of the shares of the general dividend, which belong to the particular shareholder, in any manner contrary to the will, or without the consent or authority of that particular shareholder. Any application of or dealing with the capital, or any part of the capital, or any funds or money of the company, which may come under the control or management of the directors or governing body of the company, in any manner not distinctly authorized by the act of parliament, is in my opinion an illegal application or dealing; and without meaning to say that it is or could be practicable for individual shareholders to interfere on every occasion, however small, of alleged misapplication of particular sums, I am of opinion that if, as in this case, the directors are proceeding upon an illegal principle, and for purposes not authorized by the act of parliament, to involve the company, or the shareholders of the company, or any of them, in liabilities to which the shareholders, or any of the shareholders, never consented, relief may and ought to be given in this court; and that the mere circumstance of the Brighton company having obtained, as it is not disputed they did lawfully obtain, a certain number of shares in the Portsmouth company, is not a reason why the company should be enabled or permitted to purchase more shares, and thereby increase the risks to which parliament permitted the shareholders to be exposed by the shares which may have become vested in them by the Amalgamation Act, or any reason why the directors should be permitted to divert so much of the funds of the company as they think proper, or indeed any portion of those funds, for the support of another company having distinct objects, and meant to be applied to purposes different from those in consideration of which alone those powers were granted to them." *Ante*, § 56. Where the statute prohibits the directors of a company from being concerned, directly or indirectly, in building its road, a contract between the company and two of its directors, for that purpose, is absolutely void. Barton *v.* Port Jackson, &c. Plank Road Co. 17 Barb. 397.

statutes * of the legislature and the company, or, as it is expressed, "by reason of any lawful act done by them."

2. But directors have been held liable, in many cases, personally, where the debt was that of the company, and where it so appeared upon the face of the contract. As upon a promissory note, which was expressed, "jointly and severally we promise to pay," "value received for and on behalf of the Wesleyan News-

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The deed of a joint-stock banking company contained provisions, that the directors should be, not fewer than five, or more than seven; that three, or more, should constitute a board, and be competent to transact all ordinary business, and that the directors should have power to compromise debts. Agents might be appointed by the directors, to accept, or draw bills, without reference to the directors. The number of directors became reduced to four, and three executed a deed, compromising a large debt due the company, taking from the debtor, a mining concern, and covenanting to indemnify him against certain bills of exchange.

In an action on this covenant, held that it did not bind the company, not being ordinary business, and no number of directors less than five being competent to transact it. And query, whether a board of three directors could transact even ordinary business, unless when the board consisted of five only. Kirk *v.* Bell, 12 Eng. L. & Eq. R. 385.

But where a series of contracts have been openly made, by the officers of a corporation, within the knowledge of the corporators, who have acquiesced in and derived benefit from them, the contracts are binding upon the corporation, although not expressly authorized in its charter. And if it be a municipal corporation, it is bound to pay whatever is due, by taxes, if it has no other means. Alleghany City *v.* McClurkan, 14 Penn. St. R. 81.

So also where, by consent of the board of directors, a general agent was employed in making contracts for the purchase of the right of way, and were in the habit of agreeing upon the price, by submission to arbitrators, and the awards had been paid, in such cases, by the company's financial officers, under a general resolution, to pay the amount these agents directed, it was held that such agent, and another agent employed to assist in the same service, had power to submit the question of price, in such cases, to arbitrators, and their award was binding upon the company. And it is not requisite, that the contract of submission should be under the seal of the company, in such case, nor will it be avoided by the agent attaching a seal to its execution, by himself. Wood *v.* The Auburn & Roch. Railway, 4 Seld. 160. But the fact that the directors have executed some ten or twelve similar contracts, and that such contracts had been published in the annual reports, and distributed to the stockholders without objection, although evidence of acquiescence on their part is not evidence of the enlargement of the charter powers of the company, so as to bind the company, as between them and the primary parties, entering into the contract with them. *McLean*, J., in Zabriskie *v.* C. C. & C. Railw. 10 Am. Railw. Times, No. 15. *Ante*, § 56.

paper Association. S. & W., Directors."[1] But it is ordinarily a question of *intention, whether the directors are personally liable if they act within the powers conferred by the company.[2]

3. But where the directors of a railway assume to do an act exceeding their power, as accepting bills of exchange, which does not come within the ordinary business of railways, they will be personally liable.[3]

4. But the business of railways is so much extended in this country, as borrowers of money, carriers, and contractors, in various ways, that it is not easy to determine, except from each particular case, how far the directors may draw, or indorse bills, or indeed what particular acts they may or may not do.

5. By the construction of the English statutes, if a trustee, or director of any public work, make a contract for any matter, not provided for in the special acts of the company, or by the general statutes, applicable to the subject, or in a different form from that so provided, he is taken to have intended to become personally responsible.[4]

6. Thus where a check, on the company's bankers, for payment to a third party of the company's money, was drawn by three directors, in the name of the company, but the document was signed by them, in their own names, and countersigned by the secretary of the company, adding to his name "Secretary," and a stamp bearing the name of the company was affixed, but the three directors did not appear, on the face of the check, to be directors, or to sign, as such, it was held that it did not pur-

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1 Healey *v.* Story, 3 Exch. R. 3. *Alderson*, B., said the terms, jointly and severally, imported a personal undertaking, inasmuch as they could properly have no application to the company. But see Roberts *v.* Button, 14 Vt. R. 195, and the cases cited, where the subject is examined more at length, than space will here allow. Dewers *v.* Pike, Murphy & Hurl. 131. But in the case of Lindus *v.* Melrose, 31 Law Times, 36, before the Court of Exchequer Chamber, (Feb'y, 1858,) it was held that a promissory note expressed, "For value received we jointly promise to pay," and signed by three of the directors of a joint-stock company, and countersigned by the secretary, and expressed to have been on account of stock of the company, did not bind the signers personally, but imported, on its face, a contract on behalf of the company.

2 Tyrrell *v.* Woolley, 1 Man. & Gr. 809; Burrell *v.* Jones, 3 B. & Ald. 47.

3 Owen *v.* Van Uster, 10 C. B. 318; Roberts *v.* Button, 14 Vt. R. 195.

4 Parrott *v.* Eyre, 10 Bing. 283; Wilson *v.* Goodman, 4 Hare, 62; Higgins *v.* Livingstone, 4 Dow, P. C. 341.

port to be the check of the company, and was not binding on them.[5]

*SECTION III.

COMPENSATION FOR SERVICE OF DIRECTORS.

1. *In England, directors of railways not entitled to compensation for services.*
2. *But the company may grant an annuity to a disabled officer.*
3. *In this country are entitled to compensation, in conformity to the order of the board.*

§ 176. 1. In England, in the absence of contract, or usage, from which one might be inferred, directors of railways, and other corporations, are not entitled to compensation for services, as directors. This is regarded as an office, and so an honorary service. And a resolution of the board of directors, that compensation should be allowed for certain specified services, not being under seal, so as to amount to a by-law, will not entitle such director to sue the company, for compensation for such service.[1]

2. But it would seem, that where the company voted an annuity to a disabled officer, in the nature of a retiring pension, and the directors, by deed, in the name of the company, made a formal grant in conformity with the vote, that the contract is binding upon the company, although no power is expressly given, by their charter, to grant annuities.[2]

3. Railway directors in this country are generally allowed compensation, but cannot recover it, beyond the rate fixed, by the general resolutions of the board.[3] And where a director acts, as a member of the executive committee of the board, or in selling the bonds of the company, his service is to be regarded as in his capacity of director, and the amount of compensation is limited, to that allowed directors.[3]

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[5] Serrell *v.* Derbyshire, Staffordshire & Wor. J. Railway, 19 Law J. 371; S. C. 9 C. B. 811. It would seem, that without much latitude of construction, this case might have been otherwise ruled, and been more satisfactory.

[1] Dunston *v.* The Imp. Gas L. Co. 3 B. & Ad. 125. But see Hall *v.* The Vt. & Mass. R. 28 Vt. R. 401. The rule of law in that respect is different in this country, a resolution of the board of directors having the same force, whether under seal or not. *Ante*, § 137, 169.

[2] Clarke *v.* Imp. G. L. Co. 4 B. & Ad. 315.

[3] Hodges *v.* Rut. & Burlington Railway, 29 Vt. R. But where a director per-

* SECTION IV.

RECORDS OF THE PROCEEDINGS OF DIRECTORS.

§ 177. The English general statutes require the directors to keep minutes of all appointments, contracts, orders, and proceedings, of the directors and committees, in books kept for that purpose, and these duly made, are receivable, as evidence, without further authentication. But this is held not to exclude other evidence of such transactions.[1]

SECTION V.

AUTHORITY OF DIRECTORS TO BORROW MONEY, AND BUY GOODS.

1. *Authority of directors to bind company, express or implied.*
2. *General agent will bind company within scope of his duties. Directors presumed to assent to his contracts.*
3. *Contracts under seal of company* primâ facie *bind them.*
4. *Strangers must take notice of general want of authority in directors, but not of mere informalities.*
5. *Cannot subscribe for stock of other companies.*
6. *May borrow money if requisite.*

§ 178. 1. Joint-stock companies, under many of the English statutes,[1] are held bound by contracts made, by a competent board of directors, though not under seal, and not made in strict compliance with the acts.[2] But those, who seek to bind such

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forms services for the company, disconnected with his office, he is not restricted in regard to compensation, by any resolution of the board, in regard to the compensation to be made the directors. Henry *v.* Rut. & Bur. Railway, 27 Vt. R. 485. In another case it was held, that railway directors, as a general rule, are not entitled to compensation for their personal services, unless rendered under some express contract. Hall *v.* Vermont & Mass. Railway, 28 Vt. R. 401.

[1] Inglis *v.* The Great Northern Railway, 16 Eng. L. & Eq. R. 55. Lord *St. Leonards* said, in the H. of L., "But independently of the evidence furnished by the books—the due appointment—was proved by a witness, and his evidence was admissible evidence, for the act confers a privilege, but does not exclude other evidence of the fact." Miles *v.* Bough, 3 Q. B. 845.

[1] 7 & 8 Vict. ch. 110.

[2] Ridley *v.* Plymouth Banking Co. 2 Exch. R. 711. Where one has the actual charge and management of the business of a corporation, with the knowledge of the directors, the company will be bound by his contracts made on their behalf,

companies, on contracts made with the directors, must show their authority to bind the company, either by the terms of the deed of settlement, or that the body of the shareholders authorized these persons to act on their behalf. A ratification by a competent board of directors will bind the company.[2]

2. The general rule upon this subject, in regard to goods and money, which is obtained by agents, ostensibly clothed with *competent authority, and which actually goes to the use of the company, seems to be, that the company is holden. Thus where a joint-stock manufacturing company, having a board of directors, with authority to appoint officers, and delegate their authority, purchased goods through the general manager of the company, or his deputy, or the secretary, all of whom were duly appointed, and when the goods were delivered, on the company's premises, and used for their purposes, they were held liable, on the ground, that the manager had authority to give such orders, in the absence of any express provision to the contrary. And it was held, that, as to the others, the directors must be taken to have known, that the goods had been furnished and used, and that therefore the company was liable to pay for them.[3]

3. A contract under the seal of the company is *primâ facie* binding upon them. In such case it is not enough in order to defeat a recovery upon the contract, to show an excess of authority on the part of the directors, who made the contract.[4]

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within the apparent scope of the business thus intrusted to him. Goodwin *v.* Union Screw Co. 34 N. H. R. 378.

[3] Smith *v.* Hull Glass Co. 9 Eng. L. & Eq. R. 442. And where the general agent of a manufacturing company directed the clerk to issue a promissory note in the name of the company, and it was shown, that the note was in the form customarily used by the company, in other similar cases, and which they had always recognized, it was held to be sufficient proof of the execution of the note by the company, to go to the jury, and to warrant them in finding that the company had adopted, by usage, the signature of their agent, as their own, and intended to be bound by it. Mead *v.* Keeler, 24 Barb. R. 20. Such company may borrow money for its legitimate business, and bind itself, by a written obligation for its repayment. Ib. See also Curtis *v.* Leavitt, 15 New York Court of Appeals, 9, where this subject is discussed.

[4] Royal British Bank *v.* Turquand, 32 Eng. L. & Eq. R. 273. Lord Ch. J. *Campbell* said, in giving judgment: "A good plea must allege facts to establish illegality, as was done in Collins *v.* Blantern, 2 Willes, 347, and Paxton *v.* Popham, 9 East, 408. A mere excess of authority by the directors, we think of itself would not amount to a defence. The bond being under the seal of the

The defence must establish such an excess of authority, as was known to the other *party, or such as may be presumed to have been so known, and thus virtually establish *mala fides*, both on the part of the directors and the other contracting party.[4]

4. The case of Royal British Bank *v.* Turquand, just referred to, was affirmed in the Exchequer Chamber,[5] in which a somewhat important distinction seems to be made, between a general want of authority in the directors, to do the act, in question, in any case, and a mere want of authority, in the particular instance, for want of the requisite formalities on the part of the company, they being bound in the latter and not in the former case. *Jervis*, Ch. J., in giving judgment, said, "Parties dealing with these joint-stock companies, through the directors, are bound to read the deed, or statute, limiting the directors' authority, but they are not bound to do more. The plaintiffs, therefore, assuming them to have read this deed would have found,

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company, the gist of the defence must be illegality. If the directors had exceeded their authority, to the prejudice of the shareholders by executing the bond, and this had been known to the obligees, illegality, we think, would have been shown. The obligors in executing, and the obligees in accepting the bond, might be considered, as combining together to injure the shareholders. The two parties would have been in *pari delicto*, and the action could not have been maintained. In such circumstances *potior est conditio defendentis*. But without the *scienter* and without prejudice to the shareholders, or any others whatsoever, illegality is not established against the obligees. If no illegality is shown as against the party with whom the company contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders." And again, "The plaintiffs have *bonâ fide* advanced their money for the use of the company, giving credit to the representations of the directors, that they had authority to execute the bond, and the money which they advanced and which they now seek to recover, must be taken to have been applied, in the business of the company, and for the benefit of the shareholders." "The case of Hill *v.* Manchester Waterworks Co. 2 B. & Ad. 544, is an instance of such a bond being upheld, the pleas not disclosing any fraud, or injury, done to the shareholders of the company, and the case of Horton *v.* Westminster Improvement Commiss. 14 Eng. L. & Eq. R. 378, was decided on the same principle." Agar *v.* Athenæum Life Assurance Co. 30 Law Times, 302, is decided on the authority of R. British Bank *v.* Turquand, *infra*. n. 5. A release purporting to be under the corporate seal, and signed by the president of the company, and exhibited by them in court, as their act, would operate as an estoppel upon the company, in any suit between the party as to whom the release was given and the company. Scaggs *v.* Baltimore & Wash. Railw. 10 Md. R. 268.

[5] 36 Eng. L. & Eq. R. 142.

not a prohibition to borrow, but a permission to borrow, on certain things being done. They have, in my opinion, a right to infer, that the company, which put forward, their directors to issue a bond of this sort have had such a meeting, and such a resolution passed, as are requisite to authorize the directors in so doing."

5. It was held that a joint-stock business company had no power to take stock in a savings bank, and that a loan effected by that means, could only be enforced to the extent of the money actually received by the company, over and above the amount, retained upon the subscription.[6]

6. There seems to be no question made of the general right of corporations, both public and private, to borrow money, so far as their legal functions may require it. But it was once doubted, whether this could be done, except under the corporate seal.[7] But the cases now show that no such thing is requisite.[8]

*SECTION VI.

DUTY OF RAILWAY DIRECTORS TO SERVE THE INTERESTS OF COMPANY.

1. *General duty of such office defined.*
2. *Claim for secret service and influence with directors.*
3. *Opinion of Justice Hoffman upon the legality of such contracts.*

n. 3. *Cases reviewed upon the subject of secret services.*

§ 179. 1. The general duty of railway directors is stated, somewhat in detail, in another part of this work.[1] It is an important and public trust, and whether undertaken for compensation, or gratuitously, imposes a duty of faithfulness, diligence, and truthfulness, in the discharge of its functions, in proportion to its difficulty and responsibility.

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[6] Mutual Savings Bank *v.* Meriden Agency Co. 24 Conn. R. 159. See also *post*, § 211, note 3.

[7] Wilmot *v.* Corporation of Coventry, 1 Younge & Coll. 518.

[8] Marshall *v.* Queenborough, 1 Simons & Stu. 520. See cases before referred to in this section. And it was held that the directors of a company incorporated for making a cemetery could not raise money, by indorsing and accepting bills, for the purposes of the undertaking. Steele *v.* Harmer, 14 M. & W. 831. The same principle is recognized in the earlier cases. Broughton *v.* Manchester Waterworks, 3 B. & Ald. 1; Clarke *v.* Imperial Gas-Light Co. 4 B. & Ad. 315.

[1] § 211, n. 6, *post.*

2. An important case, involving incidentally the duty of railway directors, arose recently, in the Superior Court of the city of New York.[2] The plaintiff claimed pay for labor and services, in procuring for the defendants, the contract for the construction and equipment of the Ohio and Mississippi Railway, from Cincinnati to St. Louis. The mode of his performing this service seems to have been through one Clement, who knew nothing of defendants, but who acted upon the plaintiff's recommendation of them, and for the agreed compensation of $10,000, secretly influenced the directors of the railway, by personal solicitation, to give the contract to the defendants.

3. Mr. Justice *Hoffman*, in giving judgment, makes some suggestions, upon the general subject, well worthy of our notice. "Undoubtedly this was the employment of Clement, for a bribe, to use personal influence with the directors, to secure a lucrative contract for one, of whose capacity and responsibility he was entirely ignorant. He was to use this secretly and with individuals.

"The directors of this great railroad scheme, if they stood not in the capacity of public officers, owing a duty to the state, yet were trustees of the stockholders of the road, and owed the best efforts of industry, integrity, and economy, to them.

"No one can deny, that a stipulation for any personal advantage or profit, which might attend and influence the discharge of their *trust to the stockholders, would be a violation of duty; and no engagement given to them, or contracts made with them, for that object, could bear the scrutiny of the law.

"If, again, one of their officers, if Mitchell, for example, empowered to negotiate and finally to settle the contract with Seymour, had received an obligation for the payment of a sum of money for his services, it could never have been enforced." The learned justice cited and commented upon the following cases in support of the principle which would avoid such agreements;[3]

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[2] Davidson *v.* Seymour *et al.* General Term, April, 1857, Law Reporter, July, 1857, p. 159; Redmond *v.* Dickerson, 1 Stockton, Ch. R. 507.

[3] Gray *v.* Hook, 4 Comst. 451; Waldo *v.* Martin, 4 Barn. & Cress. 319; 2 Carr. & Payne, 1; Harrington *v.* du Chastel, 2 Swanston, 167; Hopkins *v.* Prescott, 4 Com. Bench R. 578; Money *v.* Macleod, 2 Simons & Stuart, 301; Marshall *v.* Baltimore and Ohio Railroad Co. 16 Howard, U. S. R. 314, 325; Fuller *v.* Dame, 18 Pick. 472.

and continued: *"I am led to the conclusion, that it would be impossible to allow Clement to sustain an action upon the agree-

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Lord Chancellor *Eldon* says, in regard to one acting as the agent of others, and who secured a large sum to himself, without the knowledge of those on whose behalf he acted, "It is impossible for this court to sanction such a proceeding." Fawcett *v.* Whitehouse, 1 Russ. & M. 132.

Mr. Shelford, the learned author of the Treatise on Railways, thus lays down the rule, in regard to the duty of the directors of a railway company, pp. 193, 194. "The employment of a director is of a mixed nature, partaking of the nature of a public office. . . . If some directors are guilty of a gross non-attendance, and leave the management entirely to others, they may be guilty, by these means, of the breaches of trust, which are committed by others. By accepting a trust of this sort, persons are obliged to execute it with fidelity and reasonable diligence, and it is no excuse that they had no benefit from it, and that it was merely honorary. . . . Supine and gross negligences of duty will amount to a breach of trust." Charitable Corporation *v.* Sutton, 2 Atk. 400. The same principle in regard to the effect of the service being gratuitous, is found in the celebrated case of Coggs *v.* Bernard, 1 Salk. 26. In Marshall *v.* Baltimore and Ohio Railway, *supra*, Mr. Justice *Grier* made some very pertinent remarks, in regard to the duty of courts of justice, in enforcing against railway companies contracts for obtaining legislative grants, by extraordinary efforts and influences, secretly exercised. This was an action to recover $50,000 for secret service, in getting a bill through the legislature of Virginia, giving the company the right to carry their road through the state. The learned judge said: "All persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practising deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

"Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means, which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

"Influences secretly urged under false and covert pretences must necessarily

ment with him. *There was in it most of the elements of a vicious contract, which have avoided similar obligations in the

operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself, are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union, and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome,—'*omne Romæ venale.*'"

The following cases take a similar view. Wood *v.* McCann, 6 Dana, 366; Hunt *v.* Test, 8 Alab. 713; Harris *v.* Roof, 10 Barb. 489; Rose *v.* Truax, 21 Barb. 361. The enormity of such transactions, in some quarters, if universal and concurrent general opinion may be regarded as authentic, is truly appalling, to any just sentiment of confidence in official fairness, and responsible relation to public trusts. It is probable that the virus of the disease lies deeper in the fountains of the common moral sentiment, than we have generally supposed. We feel no disposition to join in a general outcry upon the subject. For we do not believe, as a general thing, that such evils are likely to be cured by any formal criticisms, either in the abstract or in particular cases, whether it come from the bench or the press. The difficulty is one which, for its cure, demands sterner remedies. The perpetrators of such enormities are quite too apt to consider, that because they have been made the victims of some severe strictures, in high places perhaps, they have expiated their guilt, and perhaps earned an indulgence for the future; and so rush at once into a deeper chasm of iniquity, just as soon as another tempting occasion presents. And it is not uncommon, that the administrators of the law, even in such cases, after having administered a somewhat scathing rebuke to the perpetrators of such crimes, begin to feel compunctious visitings, and terminate the drama, which was introduced with such a high sounding announcement, by the infliction of a most insignificant penalty, which renders both the law and its ministers, more or less, objects of contempt.

The true method undoubtedly, in such cases, if we desire to make the law, as it should be, a just and unaffected terror to evil-doers, is to say little, but do justice. Let the judgments of the courts, rather than the comments of the judges, testify to the sense of abhorrence of such crimes. These philippics from the bench generally are very justly regarded, not only by the people at large, but by the culprits themselves, as a kind of apology for the sentence, and thus destroy half its good effect. And if the other half is deducted by the judge, on account of the plainness and the honesty of the rebuke which he has already administered to the offender, very little remains.

leading cases cited. There *was secrecy, individual application, a concealed promise of compensation, and utter ignorance and

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But the exposition of the subject, in an important case in the city of New York, is so instructive, that we venture to repeat it here. *In re* Robert W. Lowber *v.* The Mayor, Aldermen & Commonalty of the City of New York; and *In re* A. C. Flagg, Comptroller, and others, tax-payers, *v.* Lowber. The gist of these cross-actions is, that by collusion with certain of the city authorities, Lowber was to receive $200,000 for a piece of land for a market on the East River. The arrangement was made by consenting to a judgment of court on the report of a referee. Comptroller Flagg, upon hearing of this judgment, took measures for obtaining a stay of proceedings. In giving judgment on this motion, *Roosevelt*, J., said :—

"The decision of the general term of the superior court, it may be said, was not pronounced, and of course was not known, till some months after the title in this case was passed, and even some weeks after the judgment in the present action was entered. But the fact, while it affords matter of vindication to the corporation counsel, is at the same time, of itself, a sufficient reason, under the circumstances, for opening the judgment, a reason, as it seems to me, not only sufficient, but controlling,—leaving in any just view of the subject no alternative. To say that the citizens, in such a case, are to hazard more than a half million of dollars, the probable cost of land and market, and that there is no relief, would be monstrous. The proposition shocks all our notions of law and judicial proceedings, and especially when broached in a court having, by the constitution, general jurisdiction in law and equity."

"'As matter of law,' (says the counsel of the city in his second point,) 'I deny that the corporation can be ordered by this, or any court, to defend a suit.' The counsel seems to forget that if the corporation (by which he means the aldermen and other officers of the corporation) cannot be ordered to defend a suit, the corporators may be permitted to do it for them; and that if the court cannot compel the corporation to resist an unjust claim, it can refuse to permit its records to be used as the machinery for enforcing it.

"If this were not so, of what avail would be the legislative restrictions on the power of contracting debts and on the power of exercising extensive functions? All the property of the city, and all its revenues, past, present, and prospective, from taxation or otherwise, might be disposed of without appeal, by a single act of mortgage or conveyance, clothed in the form of a concerted judgment—a judgment, at the most, nominally defended, but really confessed—and of which, as in this case, the court itself, without its knowledge, might be made to figure as the innocent author.

"As matter of law, I deny that the court can be made, and thus in effect 'ordered,' by the boards of direction, by whatever name called, of this or any corporation, thus to lend its aid to violate the law, and ruin the corporators. Nor is it true either, that the corporation counsel, in the defence of suits in this court, brought against the city, is subject to the absolute orders of the two boards, and 'only responsible' to them. Although in the loose language of ordinary discourse, the aldermen and assistant aldermen are commonly called 'the corpora-

recklessness as to the competency of the party whose cause he was promoting, and whose reward he was to receive. There is the difference, that these directors were servants of an organization inferior to that of a state, yet acting in a very spacious sphere, and representing an extensive body of constituents. The difference between their *position and that of legislators, upon a question like this, appears to me but shadowy.

"If, then, the claim of Clement would be promptly rejected, does the present plaintiff stand in a better position? His original employment might have been consistent with an open, avowed agency, an intent or instructions to make it known, and thus be free from all objections. But we are left in ignorance of what the terms of such original agreement were,—how far they extended. All is indefinite, except merely an employment. He engages Clement, and here again, that employment may have

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tion,' they are in fact only its legislative, as distinguished from its executive, organs. The corporation of the city, as we have seen, consists of the whole body of the citizens. The citizens are the *quasi* stockholders. The 'charter officers,' whether legislative or executive, including the 'head of the law department,' are merely the agents and trustees of the citizens, and all ultimately responsible to them. It is an error on the part of the corporation counsel to assume, as he does in his third point, that he is 'responsible only to his client,' and that the client is the common council, as distinguished from the 'commonalty.' His office is the direct gift of the people, made elective for the express purpose of putting an end to the subserviency previously supposed to exist, and of creating a check or counterpoise in its stead. Nor is this all; the corporation counsel, when conducting the prosecution or defence of a suit in court, is an officer of the court, and as such, and like any other attorney in like case, responsible to the court. Although subject, within certain limits, to the legally authorized resolutions of the common council, when acting in his general character of 'counsel to the corporation,' when acting as an attorney of the court, he is subject to the rules and regulations of the court, and with this intimation will, I have no doubt, be 'perfectly prepared [see his communication] to perform any duty which such a result, or the office he holds, may devolve upon him.'

"An order will, therefore, be entered (first submitting a draft to the court for settlement) directing that the judgment and execution be set aside, as also the answer, reference, and report; and that a new answer, to be prepared by the counsel to the corporation, and approved by the comptroller, be filed and served in twenty days from the date of this order, unless the comptroller, within the said twenty days, should elect, as he may, officially, and as a tax-payer and corporator, on behalf of himself and others, to file an original bill of complaint, setting forth such matters and making such parties, and praying such relief in the premises as he may be advised."

See also Semmes *v.* Mayor, &c. of Columbus, 19 Ga. R. 471.

been perfectly free from censure on the plaintiff's part. But upon the best consideration we can give, we cannot separate the act of Clement from the acts of the plaintiff. There is a legal identity for the purposes of this action. The plaintiff must be held to have employed Clement to do what he did do, or to have been bound to superintend his proceedings, and free them from what was illegal. It is impossible to permit him to profit by the misdeeds of his own agents, however ignorant and exempt from them himself. His ignorance, when knowledge was a duty, becomes equivalent to a fault."

SECTION VII.

RIGHT TO DISMISS EMPLOYEES.—RULE OF DAMAGES, WHEN DONE WRONGFULLY.

1. *Some cases hold that if wrongfully dismissed, may recover salary.*
2. *English courts do not favor this view. Case stated by English judges.*
3. *The American cases have sometimes taken the same view.*
4. *Where the contract provides for a term of wages, after dismissal, it is to be regarded as liquidated damages.*
5. *Statute remedy, in favor of laborers of contractors, extends to laborers of subcontractors.*

§ 180. 1. Where a railway company dismiss a servant, superintendent, or other employee, without just cause, it seems to be considered in some cases, that they are *primâ facie* liable for the salary, for the full term of the employment.[1] This proposition has been often made by judges, and seems to have been acquiesced in, by the profession, to a very great extent, but in a late English case,[2] *where the subject is examined with great thoroughness, the opinion of the judges certainly seems to incline to a different result. *Patteson*, J. said:—

2. "I am not aware, that this precise point has been raised in

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[1] Costigan *v.* The Mohawk & Hudson Railway, 2 Denio, 609.

[2] Goodman *v.* Pocock, 15 Q. B. 576. This is the case where a clerk dismissed, in the middle of the quarter, brought an action for the wrongful dismissal, on the special contract, and in the trial of the action, the jury were instructed that they should not, in assessing damages, take into account the services rendered by plaintiff in the broken quarter, for which he had received no pay. The plaintiff then brought this action for those services, and here the court held, that those services should have been taken into account in assessing damages in the former action, and that no recovery could be had in this action, on account of the former recovery.

any case." . . . "Mr. Smith, 2 L. Cases, 20, says, 'that a clerk, servant, or agent, wrongfully dismissed, has his election of three remedies. 1. He may bring a special action for his master's breach of contract, in dismissing him. 2. He may wait till the termination of the period for which he was hired, and may then *perhaps* sue for his whole wages, in *indebitatus assumpsit*, relying on the doctrine of constructive service. Gandell *v.* Pontigny, 4 Camp. 375. 3. He may treat the contract, as rescinded, and may immediately sue upon a *quantum meruit*, for the work he actually performed. Planché *v.* Colburn, 8 Bing. 14.' I think Mr. Smith has very properly expressed himself with hesitation, as to the second of the above propositions; it seems to me a doubtful point."

Lord *Campbell*, Ch. J., and *Coleridge*, J., both agree, that the party dismissed, without cause, may bring *indebitatus assumpsit*, for the service actually performed, or may sue for the breach of the contract, in dismissing plaintiff, but cannot do both.

And *Erle*, J., lays down the rule very distinctly, and, as it seems to us, upon the only sound and sensible basis. "The plaintiff had the option, either to treat the contract as rescinded, and to sue for his actual service, or to sue on the contract for the wrongful dismissal. . . . As to the other option, referred to by Mr. Smith, I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages, on the ground of a constructive service, after dismissal. I think the true measure of damages is the loss sustained, at the time of dismissal. The servant after dismissal may, and ought to make the best of his time, and he may have an opportunity of turning it to advantage. I should not say any thing, that might seem to doubt Mr. Smith's very learned note, if my opinion on this point were not fortified by the authority of the Court of Exchequer Chamber, in Elderton *v.* Emmens, 6 Com. B. 160."

*3. The cases[3] in this country have sometimes taken a similar view of the rule of damages, in such cases, and the rule must, we think, ultimately prevail everywhere.[4]

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[3] Algeo *v.* Algeo, 10 Serg. & Rawle, 235; Donalson *v.* Fuller, 3 id. 505; Perkins *v.* Hart, 11 Wheaton, 237.

[4] Spear & Carlton *v.* Newell, Sup. Ct. Vt., not reported. In this case the

4. Where the contract specifies the time for which the party employed shall be entitled to wages after notice of dismissal, that is to be regarded as stipulated damages for the breach of the contract.[5] But even this cannot be recovered under the *indebitatus* count, for work and labor.[6]

5. Where the statute provides, that the laborers of contractors upon a railway may give notice to the company, of their wages remaining unpaid, in certain contingencies, and thus charge the company, the provision was held to extend to laborers and workmen of sub-contractors.[7]

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plaintiff sued for the price of rags and other materials furnished, to supply a paper-mill of defendant, under special contract. The materials were, at one time, unfit for use, on account of latent defects, for which, by the contract, the plaintiffs were liable. The defendant claimed the rule of damages should be the rent of the mill and the expense of supplying workmen until good materials were furnished. But the court held, that it was the duty of the defendant to make the best of the case, on his part, and that he could only recover, such damages as intervened, before he had opportunity to supply himself, with proper materials for use.

[5] Hartley *v.* Harman, 11 Ad. & Ellis, 798.

[6] Fewings *v.* Tisdal, 1 Exch. 295.

[7] Kent *v.* New York Central Railway, 2 Kernan, 628. Peters *v.* St. Louis & Iron Mountain Railw. 24 Mo. R. 586. Where the statute in such case makes the company liable for thirty days' labor of the workmen, it is not indispensable, that the labor should have been performed in thirty consecutive days, to entitle them to compensation against the company. Such claims may be sued in the name of an assignee, under the new code of Missouri. Id.

*CHAPTER XXIV.

ARRANGEMENTS BETWEEN DIFFERENT COMPANIES.

SECTION I.

LEASES, AND SIMILAR CONTRACTS, REQUIRE THE ASSENT OF LEGISLATURE.

1. *By English statutes one company may pass over road of another, but contract binding.*
2. *But cannot transfer duty of one company to another, without legislative grant.*
3. *Original company liable to public, after such lease.*
4. *Courts of equity enjoin companies from leasing, without legislative consent.*
5. *But such contracts, made by legislative grants, are to be carried into effect.*
6. *Majority of company may obtain enlarged powers, with new funds.*
7. *So the majority may defend against proceedings in legislature.*
8. *Legislative sanction will not render valid, contracts* ultra vires.
9. *Railway company cannot assume duties of ferry, without legislative grant.*

§ 181. 1. The English statute[1] gives special permission to one company to contract with other companies for the right of passage over their track. And this has been construed, to give the right to contract for the privileges ordinarily attaching to such passage, of stopping at the stations, and taking up, and putting down passengers, and freight.[2] The parties will be bound by the terms of the contract, notwithstanding the ninety-second section of the act, which gives all companies, and persons, the right to use railways, upon the payment of the tolls demandable.[3]

2. But an agreement between railway companies, without the authority of the legislature, transferring the powers of one company to the other, is against good policy, and a court of equity *will not lend its aid to carry such contract into effect.[4] But it

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1 8 & 9 Vict. ch. 20, § 87.

2 Simpson *v.* Denison, 16 Jurist, 828; 2 Shel., Ben. ed. 694; 13 Eng. L. & Eq. R. 359.

3 Great Northern Railway *v.* Eastern Co. Railway, 9 Hare, 306; 2 Shel., Ben. ed. 696; 12 Eng. L. & Eq. R. 224.

4 Same case, 12 Eng. L. & Eq. R. 244; South Yorkshire Railway *v.* Great N. Railway, 19 Eng. L. & Eq. R. 513; Johnson *v.* Shrewsbury & B. Railway, id. 584.

has been held, that a contract, by which one railway gives another the right of passage, upon the guaranty of a certain per cent. profit upon their stock and all other investments, is a payment of tolls within the statute.[5] It seems to be considered, by the English courts, that one railway leasing its entire use to another company does not come within this section of the general statute, and as the public thereby lose the security of the first company, for care and diligence, in the discharge of its public duties, the contract, unless made, in pursuance of an act of the legislature, or ratified by such act, is illegal, as against public policy.[6] At all events a court of equity may properly decline to lend its aid in enforcing a specific performance of such contract.[7]

3. But even where such contracts have been made, by permission of the legislature, it has been held, in this country, that the company leasing itself does not thereby escape all responsibility to the public. But that the public generally may still look to the original company, as to all its obligations and duties, which grow out of its relations to the public, and are created, by charter and the general laws of the state, and are independent of contract, or privity, between the party injured and the railway.[8]

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[5] The South Yorkshire R. & C. *v.* Great Northern Railway, 22 Eng. L. & Eq. R. 531; s. c. in Exchequer Ch. 25 Eng. L. & Eq. R. 482. One company having made a beneficial contract with another company, in regard to traffic, may with a lease of itself transfer the benefit of this contract. London & S. W. Railway *v.* South E. Railw. 20 Eng. L. & Eq. R. 417.

[6] Johnson *v.* The Shrewsbury & Birmingham Railway, 19 Eng. L. & Eq. R. 584; Troy & Rut. Railway *v.* Kerr, 17 Barb. 581. This doctrine is reaffirmed, in the House of Lords, in Shrewsbury & B. Railway *v.* L. & N. W. R. in May, 1857, 29 Law Times, 186.

[7] South Yorkshire & River Dun Co. *v.* Great N. Railway, 19 Eng. L. & Eq. R. 513; Johnson *v.* Shrewsbury & Birmingham R. 19 Eng. L. & Eq. R. 584; Shrewsbury & Birm. Railway *v.* London & N. W. & Shropshire Union Railway, 21 Eng. L. & Eq. R. 319; s. c. 1 Eng. L. & Eq. R. 122.

But see cases *ante*, n. 5; *post*, § 185.

[8] Nelson *v.* The Vermont & Canada Railway, 26 Vt. R. 717. But it is perhaps worthy of consideration, in regard to this case, that the effect of legislative consent to the lease is not made a point or decided in this case. Sawyer *v.* The Rut. & Burl. Railway, 27 Vt. R. 370. And in Parker *v.* Rensselaer & Saratoga Railway, 16 Barb. 315, where the defendants were running upon the Saratoga & Sche. Railway, by virtue of a contract, and the plaintiff's cow was killed through defect of cattle-guards, which it was the duty of the Saratoga & Sche. Railway to maintain, it was held the defendants were not liable, the neglect being attributable to the Saratoga & Sche. company. Perhaps the only question, in regard to

*4. The English courts have in some instances even restrained railway companies from carrying contracts of leasing into effect, without the authority of the legislature.[9]

5. But such contracts being legal, and not inconsistent with the policy of the acts of parliament, are to have a reasonable construction; and where, by the creation of new companies and other facilities, the business is very largely increased, the parties are still to abide by the fair construction of the original contract, as applicable to the altered circumstances.[10]

6. There is no doubt of the right of a railway company in England to apply to the legislature for enlarged powers, even for the power to become amalgamated with other companies, so as to make one consolidated company. And contracts between the different companies, for this purpose, have been there recognized, and enforced, in courts of equity.[11] And while the courts of equity will *enjoin the companies from applying their funds, to

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the soundness of this decision is, whether both companies are not chargeable with negligence, the one for suffering the road to be used, and the other for using it, in that condition. This is the view taken of the law in Clement *v.* Canfield, 28 Vt. R. 302; *ante*, § 169.

But in the York & Maryland Line Railway *v.* Winans, 17 How. 30, it is decided, that where a railway is chartered by one state, and all its stock owned, and the road operated by a corporation erected and existing in another state, the first corporation is nevertheless liable to the patentee of an improvement in railway cars, for the use of his patent, cars of that construction having been procured and used upon the road, by the corporation owning the stock of such company. *Campbell*, J., said, "The corporation cannot absolve itself, from the performance of its obligations, without the consent of the legislature."

But one company giving permission to another to use a part of their track, do not thereby become bound to keep the track in such repair, as to be safe for use. Nor do such company thereby assume any obligation towards the passengers carried thereon, by such other company. Murch *v.* Concord Railway, 9 Foster, R. 1; *post*, § 183. See also Briggs *v.* Ferrell, 12 Ired. 1. And in Vermont Central Railway *v.* Baxter, 22 Vt. R. 365, the company are held liable for the acts of the contractor, in the exercise of the right of eminent domain, in obtaining materials for constructing the road.

[9] Winch *v.* Birkenhead, L. & C. Railway, 13 Eng. L. & Eq. R. 506; Beman *v.* Rufford, 1 Simons (N. S.) 550; 6 Eng. L. & Eq. R. 106.

[10] East Lancashire Railway *v.* The L. & Yorkshire Railway, 25 Eng. L. & Eq. R. 465.

[11] Mozley *v.* Alston, 1 Phillips, 790, where Lord *Cottenham* said: "There is scarce a railway in the kingdom, that does not come to parliament, for extension of powers."

pay the expenses of such parliamentary proceedings, they will not enjoin them from obtaining additional powers, by legislative acts, when other parties volunteer to furnish the requisite funds.[12] And there seems to be no question made, in the English courts, of the power of parliament, to extend the line of a railway, or to consolidate existing companies, and that the shareholders are bound, by the acceptance of such legislative provisions, by a majority of the company, or by contracts to procure such powers by act of parliament.[13]

7. And it has accordingly been held, that a public company, as the commissioners of sewers for a county, might impose a rate to defray the expense of opposing a bill, in parliament, which threatened to affect the interests of the company, unfavorably, the same as they might to defray the expense of litigation in court.[14] Lord * *Campbell* said: "Our determination rests upon

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12 Stevens *v.* South Devon Railway, 2 Eng. L. & Eq. R. 138; Great Western Railway *v.* Rushout, 10 Eng. L. & Eq. R. 72; *post*, § 252.

13 Great Western Railway *v.* Birm. & Oxford Junction Railway, 5 Railw. C. 241. The Lord Chancellor says, that to nullify, in a court of equity, all contracts made upon the faith of obtaining the consent of the legislature, to carry them into effect, would be "to nullify many family agreements, and all contracts by persons projecting new companies." Shrewsbury. & Birm. Railway *v.* London & N. W. Railway, 9 Eng. L. & Eq. R. 394.

And it has been held, in an important case, in the Circuit Court of the United States, Columbus, Piqua. & Ind. Railway *v.* Indianopolis & Bellefontaine Railway, 5 McLean's R. 450, that an agreement between two railway companies to build their roads from certain cities, to meet at a given place, and that the charges for transportation shall be regulated by both companies, and also the meeting of the cars, and the through freight cars, is a valid contract, and will be enforced by injunction in equity. That to fix the charge for the transportation of passengers and freight, is the exercise of the corporate franchise of each company, and an agreement, that both companies shall regulate this is no abandonment, or transfer, of the franchise of either.

14 Reg. *v.* Commissioners of Norfolk, 15 Q. B. 549. The ground upon which the decisions, in England and America, which hold the franchises of corporations not to be assignable, except by consent of the legislature, rest, is mainly the same, as that upon which it has been held, in this country, that such franchises are beyond legislative control, namely, that the charter constitutes a contract, between the sovereignty and the corporation, on the one part, for the grant of certain privileges and immunities, and upon the other, for the performance of certain duties and functions, which are deemed an equivalent, or consideration. And this feature is of peculiar force, in the case of that class of corporations, upon which the legislature have conferred important public duties and functions, as railways and banks, and some others. The state confers upon a railway some of

the ground, that this opposition was clearly *bonâ fide*, and clearly prudent."

8. In a very recent case, in Vice-Chancellor *Wood's* court,[15] the defendants entered into an agreement to purchase plaintiffs' property, there being, at the time, no legislative permission, either to buy, or sell, such property. Subsequently such permission was obtained, and steps taken by the defendants, under the act, to carry the contract into effect, but they ultimately refused to complete their purchase, on the ground that the original agreement was not under the seal of the corporation, nor signed by two of their directors. The plaintiffs then filed a bill for specific performance, and it was held, that the bill must be dismissed, on the ground that the contract was originally *ultra vires*, not being made dependent upon obtaining the consent of the legislature. It is also said, that the contract would not be binding upon the company, unless made under their common seal, that being required in the defendants' special act, and if it were binding, that mandamus is the more appropriate remedy.

9. A railway company cannot acquire the franchise, so as to be bound to perform the duty of an existing ferry, without the authority of the legislature, given either expressly, or by necessary implication.[16]

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its most essential powers of sovereignty, that of eminent domain, and of a virtual monopoly, in transportation of freight and passengers, and in return therefor, stipulate for the faithful performance of these duties, by the corporation. The corporation have no more right, in equity and justice, to transfer their obligations to other companies, or to natural persons, than the state have to withdraw them altogether. Either would be regarded, as an abuse of the powers conferred, or an impairing of the just obligation of the contract resulting from the grant, and its acceptance.

15 Leominster Canal Co. *v.* Shrewsbury & Hereford Railway, 29 Law Times, 342, August, 1857. The learned judge concludes his opinion, in this case, in a manner very creditable to his sense of fair dealing, and good faith, in the conduct of railway directors: "I cannot, however, but feel, that solicitors, acting for railway companies, like that of the defendants, must be in a most painful position, when they are unable to rely (as here they cannot) upon the good faith, or even the common honesty, of directors."

16 *Battle*, J., in State *v.* Wilmington & Manch. Railway, Barber, R. 234.

*SECTION II.

NECESSITY OF CONTRACTS OF CORPORATIONS BEING UNDER SEAL.

1. *The English courts manifest great reluctance to abandon the former rule of law on this subject.*

n. 2. *Extended review of the English and some of the American cases.*

§ 182. The apparent hesitation among the English courts and text-writers,[1] to accept the acknowledged rule of the American courts, that a corporation may as well contract, by mere words, without writing, or by implication of law, or by vote, or by writing, without seal, as a natural person; in short, that in the case of a contract, by a corporation, a seal is of no more necessity, or significance, than in the case of a contract by a natural person, would seem to justify some reference here to the present state of the English law upon the subject.[2]

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[1] Hodges on Railways, 59, 60, 61, and notes.

[2] It would seem a very obvious view of the question, that if a seal is not, as was at one time claimed, indispensable to the authentication of a corporate contract; if, in short, it can be dispensed with, in any case, it becomes merely a matter of reason and discretion, or more properly perhaps, of intention, and convenience, in order to show the definite act of the company, and when it shall be required, or when a contract shall be said to be complete without it, is rather a question of usage than an unbending rule of law. Beverley *v.* Lincoln Gas Light & Coke Co. 6 Ad. & Ellis, 829, is the case of gas-metres ordered for the use of the company by one of the committee, taken on trial, and not returned in a reasonable time, and the company held liable. This is the earliest case in the English books, where the courts in that country made any formal departure from the old rule, and it was here held, that a corporation aggregate is liable in assumpsit for goods sold and delivered. *Patteson*, J., refers to the American authorities upon the subject, and says: "It is well known, that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded, in practice, by the courts of the United States." And after stating the greater facilities here for advancement in jurisprudence, the learned judge enters a formal disclaimer against "the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out;" "but when we have," says the learned judge, "to deal with a rule established in a very different state of society, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to ingraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it, which we find to have been established by previous decisions."

SECTION III.

DUTY OF THE RESPECTIVE COMPANIES TO PASSENGERS AND OTHERS.

1. *Company bound to keep road safe. Act of other companies no excuse.*
2. *Some cases hold that passengers can only sue the company carrying them.*
3. *Passenger carriers bound to make landing-places safe.*
4. *But those who ride upon freight trains, by favor, can only require such security as is usual upon such trains.*
5. *Owners of all property bound to keep it in state, not to expose others to injury.*
6. *This rule extends to railways, where persons are rightfully upon them.*

n. 3. *Cases, as to the necessity of privity of contract existing, reviewed.*

§ 183. 1. A public company, like a canal, or railway, who are allowed to take tolls, owe a duty to the public to remove all ob-

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And this seems to form the basis of the subsequent decisions of the English courts upon the subject. The decisions have evinced an effort to preserve the rule, and at the same time to invent and ingraft such a number of exceptions upon it as really to meet all the inconvenience, or absurdity, which could fairly be objected against the old rule. But in settling the exceptions, the decisions have not always commended themselves, as consistent, either with reason, or with each other. Thus affording another striking illustration of the folly of attempting to maintain an absurd rule, by multiplying exceptions, every one of which was based upon a principle of reason, which if carried to its legitimate results, would subvert the rule itself. This was in 1837, in the K. B., and established the exception to the old rule of executed contracts, for goods sold and used by the company, in the business for which it was created. The next year the same court held, that a corporation might also maintain an action upon an executory contract not under seal. Church *v.* The Imperial Gas Light & Coke Co. 6 Ad. & Ellis, 846. This was upon a contract to take gas of the company, which the defendant below declined to receive. In 1843 a case arose in the C. P. Fishmonger's Co. *v.* Robertson, 5 M. & G. 131. This was an action upon a contract to pay the plaintiffs 1,000*l.* to withdraw their opposition to a bill in parliament, and to promote its passage into a law, the parties being mutually interested in the same, and alleging performance of the contract on the part of the plaintiff. The subject was very much considered, and an elaborate opinion delivered by *Tindal*, Ch. J., and it was decided, that the contract having been executed on the part of the corporation, and the defendants having received the full consideration, were bound by the contract, and that the contract was not void, as against public policy. See also Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860, (1842,) to the same effect, where it is held, that no municipal corporation, but that of London, can appoint an attorney except under the corporate seal. Mayor of Ludlow *v.* Charlton, 6 M. & W. 815, (1840.) But the court of Q. B., in 1846, (Sanders *v.* St. Neot's Union, 8 Q. B. 810,) held, that if work be done for a corporation, and adopted by them, for purposes connected with the incorporation,

*structions in the canal, or upon the railway, although not caused by themselves, or their servants, but by those who are lawfully in

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although not under seal, they are liable for it. The case of the Governor & Company of Copper Miners *v.* Fox, 3 Eng. L. & Eq. R. 420, (1851,) holds that the plaintiffs could not sue upon a mutual contract, because the plaintiffs' portion of it, not being under seal, and being for the delivery of iron rails, and the plaintiffs being incorporated for dealing in copper, not coming within the proper business of the company, as a trading company, they were not bound by it, and by consequence the defendants were not. This case admits the exception from the old rule, of all contracts, pertaining to the proper business of the incorporation, and then attempts a distinction between dealing in iron and copper!—a distinction which, if it be of any force, would show that the contract being *ultra vires*, would not bind the company, in any form. The next case (Homersham *v.* Wolverhampton Waterworks, 6 Railw. C. 790, *ante*, § 113,) in the order of time, is for extra work, under a contract, which was done in express violation of the provisions of the general contract, in regard to extra work, and was not authorized, in the manner required, in relation to contracts, by the company's charter. It seems to have been correctly enough decided, upon either ground, that no recovery could be had. *Ante*, § 113, and cases cited. Lamprell *v.* Billericay Union, 3 Exch. R. 283, (1849.) But Cope *v.* Thames Haven Dock & Railway Co. 3 Exch. R. 841, seems to be an express decision affirming the general necessity of the corporate seal to bind the company, (1849.) So also Diggle *v.* The London & Blackwall Railway, 5 Exch. 442, is of the same character, being for extra work performed in express violation of the general contract; and there are some other cases of this kind in the English Reports.

But the next case in the order of time, involving the general question, is Finlay *v.* Bristol & Exeter Railway, 9 Eng. L. & Eq. R. 483, and here it was held, that although a corporation was liable for use and occupation, on a parol demise, it is only liable for the actual occupation, and a continuous occupation, for several years, will not render the corporation tenants from year to year. In Clark *v.* The Guardians of the Cuckfield Union, 11 Eng. L. & Eq. R. 442, the cases are all elaborately reviewed by *Wightman*, J., and the conclusion arrived at, that whenever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied, to carry such purposes into effect, and such work is done, or such goods supplied, and accepted by the corporation, and the whole consideration for payment is executed, the corporation cannot refuse to pay, upon the ground that the contract was not under seal; and the case of Lamprell *v.* Billericay Union, 3 Exch. 283, is seriously questioned. In Lowe *v.* The London & N. W. Railway, 14 Eng. L. & Eq. R. 18, it is held, that where a railway have taken possession of land, and occupied it, by the permission of the owner, for the purposes of their incorporation, that they are liable to be sued in assumpsit, for use and occupation, notwithstanding they have not entered into a contract under their common seal. But in the case of Smart *v.* The Guardians of the Poor of West Ham Union, 30 Eng. L. & Eq. R. 560, (1855,) the question came before the Court of Exchequer, and the judges manifested a firm determination to adhere strictly to the old rule. *Parke*, B., says: "With respect to

*the use of the canal, or railway, or by mere strangers.[1] Nor can

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the case of Clarke *v.* The Guardians of the Cuckfield Union, I must say, that I am not satisfied with the observations of my brother *Wightman*, for if that case be correctly decided, the effect would be to overrule several previous decisions of this court." And *Alderson*, B., says: "We must adhere to former decisions, till overruled by a court of error."

But in the case of the Australian Royal Mail Co. *v.* Marzetti, in June, 1855, in the Court of Exchequer, 32 Eng. L. & Eq. R. 572, *Pollock*, Ch. B., says, in regard to a contract not under seal, "The principle applicable to corporations, is, that in respect of small matters, where it would be absurd and inconvenient to require them to put their seals to contracts, in those cases they may contract without seal," also "*in respect of matters for which it was created.*" "These principles," adds the learned chief baron, "are founded on justice, public convenience, and sound sense," and he might have said, perhaps, with equal propriety, will finally be found, virtually to include, all the legitimate business of corporations. For it is impossible to make any sensible distinction, between the proper business of a corporation, as appears upon the face of their charter and that which is purely incidental or ancillary to the proper business of the corporation. And this is conceded by Lord *Campbell*, in the Governor & Company of Copper Miners *v.* Fox, when refining upon the very elemental distinction between a trade in iron, and copper.

And if we allow corporations to bind themselves, without seal, in all the business created by their charter, and in all that is incidental thereto, we shall have few cases remaining.

The only remaining case, directly upon the subject, which has yet reached us, is that of Henderson *v.* The Australian Royal Mail Steam Nav. Co. 32 Eng. L. & Eq. R. 167, (June, 1855,) where the defendants, a company incorporated for the purpose of carrying the mails, passengers, and cargo, between Great Britain and the Cape of Good Hope and Australia, and for that purpose to construct and maintain steam and other vessels, and to do all such matters, as might be incidental to such undertaking, entered into a contract with the plaintiff to go out to Sydney and bring home a sloop, belonging to the company, which was unseaworthy, and it was held, that the action might be maintained, for the service performed under the contract, although the contract was not under seal.

The opinion of the judges at length, will afford the safest commentary, upon the present state of the English law, upon the subject, and will present a very instructive contrast, with the quiet and perfectly settled, and satisfactory state of the law here, upon the same subject, from having, as we believe, more wisely, abandoned a rule, which grew out of an uncultivated state of society, and which had a very limited application, when adopted, and which is found, in practice, utterly inconsistent with the views of business men, in all commercial countries, at the present day.

Wightman, J.. "I am of opinion that our judgment should be for the plaintiff. This is an action against the Australian Royal Mail Steam Navigation Company,

1 Parnaby *v.* Lancaster Canal Co. 11 Ad. & Ell. 223.

a *railway company excuse themselves from liability for injury to passengers carried over any part of their road, by showing

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which is a company constituted expressly for the purpose of carrying on a trade by vessels; it is incorporated 'for the purpose of undertaking the establishment and maintenance of a communication, by means of steam navigation or otherwise, and the carrying of the royal mails, passengers, and cargo, between Great Britain and Ireland, and the Cape of Good Hope and Australasia,' and for that purpose it must maintain and employ many vessels. Can it be doubted that amongst the ordinary operations of the company there would arise a necessity for employing persons to navigate or bring home vessels which met with accidents abroad? The words of the contract, as set out in the declaration, show an employment directly within the scope of the objects for which the company was incorporated.

"It is true there is a conflict of authorities which it is difficult to reconcile. Two or three cases in the Court of Exchequer, Lamprell *v.* The Billericay Union, 3 Exch. 283, and the Mayor of Ludlow *v.* Charlton, 6 M. & W. 815, and Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860, in the Court of Common Pleas, appear to militate against the view taken by this court. But those decisions proceeded upon a principle adapted to municipal corporations, which are created for other objects than trade; and the Court of Exchequer applied that principle to modern trading companies, which are of an entirely different character.

"In early times there was a great relaxation of the rule which required that the contracts of corporations should be under seal, and that relaxation has been gradually extended. At first the relaxation was made only in those cases mentioned by Mr. Lush, when the subject-matter of the contract was of small moment and frequent occurrence, which in the case of municipal corporations might be the only exceptions necessary. But in the later cases there was a further relaxation, especially in the case of corporations created by charter for trading purposes, and other like corporations. The general result of the cases mentioned in Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. L. & Eq. R. 442, is, that in the case of trading corporations, wherever the contract relates and is essential to the purpose for which the company was incorporated, it may be enforced, though not under seal. In deciding that case, I reviewed all the cases, and adhere to the opinion, which I then expressed, that in such a case as the present, where the contract is essentially necessary to the objects of the company, and directly within the scope of their charter, it may be enforced, though made by parol."

Erle, J.: "I am of opinion that the contract is binding on the corporation, though not under seal, on the ground that it is directly within the scope of the company's charter.

"The authorities are apparently conflicting, but none conflict with the principle laid down by my brother *Wightman*, in which I concur. In Beverley *v.* The Lincoln Gas Light & Coke Company, 6 Ad. & Ell. 829, the supply of gas was directly incident to the purpose for which the company was incorporated. So also in Church *v.* The Imperial Gas Light & Coke Company, 6 Ad. & Ell. 846; and in Sanders *v.* The Guardians of the St. Neot's Union, 8 Q. B. 810; and in

that the * particular neglect was that of a servant employed and

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the elaborate judgment of *Wightman*, J., in Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. L. & Eq. R. 442, it was assumed that the matter was within the scope of the company's charter.

"The judgment delivered by Lord *Campbell*, Ch. J., for this court, in the Copper Miners' Company *v.* Fox, 16 Q. B. 229, s. c. 3 Eng. L. & Eq. R. 420, enunciated the principle. The principle affirmed by this series of cases does not conflict with the two leading cases in the Court of Exchequer, which were cases of municipal corporations. Neither building, which was the matter in the Mayor of Ludlow *v.* Charlton, 6 M. & W. 815, nor litigation, which was the matter in Arnold *v.* The Mayor of Poole, 4 Man. & Gr. 860, was incidental directly to the purposes for which the corporations of those towns were constituted.

"The other cases to which I adverted were corporations for trading purposes, and it is difficult to reconcile them. In Lamprell *v.* The Guardians of the Billericay Union, 3 Exch. 283, the action related to the building a workhouse, with which the defendants were, as a corporation, connected. Diggle *v.* The London & Blackwall Railway, 5 Exch. 442, is that which to the greatest degree conflicts, unless it can be distinguished, or explained on the ground that it was a unique contract; if it cannot, I do not agree to it; and in this conflict of authorities I adhere to those which oppose it.

"The notion that a set of contracts shall have their validity depending on the frequency and insignificancy of the subject-matter is of such extreme perniciousness, that I do not think that it can be adhered to, and must be considered as applicable only to municipal corporations. It has been so held as to contracts for servants, but I do not think that it was meant to be said that the contract was valid if the matter was of small importance, and invalid if the matter was of great importance; and indeed, in the case of trading companies, which it is allowed may draw and accept bills of exchange not under seal, it is obvious that insignificancy is no element; neither is the frequency or rarity of the contract an element. The nature of the contract and the subject-matter of it must be the principle which governs the question whether it is valid, though not under seal. It would be pernicious to the law of the country, that under the semblance of a contract, parties should obtain goods or services, and not be compellable to pay for them. The Court of Exchequer had an opinion that it would be important that the rule should be certain; but their resort to the rule, that the contract in all cases, with the above-mentioned exceptions, should be under seal, cannot be acted upon."

Crompton, J. "I concur in the principle now adopted by my brothers *Wightman* and *Erle*. It is desirable that in the case of trading corporations there should be a relaxation of the rule, that the contract of corporations should be under seal, where the contract is for the purpose of carrying on their trade. That principle was supported in The Copper Miners Company *v.* Fox, 16 Q. B. 229; s. c. 3 Eng. L. & Eq. R. 420, and Clark *v.* The Guardians of the Cuckfield Union, 16 Jur. 686; s. c. 11 Eng. L. & Eq. R. 442; and it is an important principle, and may be the governing principle in these cases; and but for the two cases in the Court of Exchequer, I should think that the appointment of the

paid by a connecting road, as a switchman, at the junction of two railways.[2]

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plaintiff in this case did not require a seal. I cannot, however, distinguish this from Lamprell *v.* The Guardians of the Billericay Union, 3 Exch. 283, and Diggle *v.* The London and Blackwall Railway Company, 5 Exch. 442; and if the judgment of the court depended upon me, I might defer to them, at the same time wishing the other principle to prevail. I cannot disguise from myself that we are deciding against the cases in the Court of Exchequer, and the rule which that court adopted. But I agree with what my brothers have said; and I will add, that those cases created considerable surprise at the time."

And in a still more recent case, Reuter *v.* The Electric Telegraph Co. 37 Eng. L. & Eq. R. 189, (May, 1856,) in the Court of Queen's Bench, the defendants had made a contract, under their corporate seal, with the plaintiff, to transmit all his messages, and all he could collect, for a commission not exceeding 500*l.*, or less than 300*l.* per annum, and while this contract was in existence, the chairman of the company entered into a parol agreement, with the plaintiff, to pay him at the increased rate of 50*l.* per cent. in consideration of the plaintiff's further services in collecting public intelligence and sending it by the company's telegraph. These additional services were found to be beneficial to the company, and this agreement was entered upon the minutes of the company, and the plaintiff had received 300*l.* for services in pursuance of it.

The deed of settlement provided, that all contracts, where the consideration exceeds 50*l.* should be signed by three directors. It was held, that the parol contract having been acted upon, and ratified by the company, was binding upon them. De Grave *v.* The Mayor of Monmouth, is a case of ratification, 4 C. & P. 111.

And in Bill *v.* The Darenth Valley Railway, 37 Eng. L. & Eq. R. 539, the Court of Exchequer held, that one who had served the company, as secretary, might recover compensation for his services, although the remuneration to be paid him had not been fixed, at a general meeting of the company, as required by the English statute. That was held to determine the duty of the directors towards the company, and not to limit the liability of the company to third parties, which is the view taken of the subject here. Noyes *v.* Rut. & Burling. Railway, 27 Vt. R. 110–113; *ante*, § 136, n. 5.

But it has been held that if a corporation contract through an agent, who attaches a seal to his execution of the contract on their behalf, it thereby becomes

[2] McElroy *v.* Nashua & Lowell Railway, 4 Cush. 400. *Shaw*, Ch. J., here says: "The switch in question, in the careless and negligent management of which the damage occurred, was a part of defendants' road, over which they must necessarily carry all their passengers, and although provided for, and attended, by a servant of the Concord company, at their expense, yet it was still a part of the Nashua & Lowell Railroad, and it was within the scope of their duty, to see that the switch was rightly constructed, and attended, and managed, before they were justified in carrying passengers over it."

*2. But it was held, that a passenger, who suffered an injury, in attempting to get upon the cars of one company, while using the road of another company, by contract with such company, through a defect in the construction of the road of the latter company, could not maintain an action against them, there being no privity of *contract, between the plaintiff and such company; the remedy being, in such case, against the company, who were carrying the plaintiff, as a passenger.[3]

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the deed of the company, although the seal was not their common seal, and an action of assumpsit cannot be maintained upon it. Porter *v.* Androscoggin & Kennebec Railway, 37 Maine, R. 349. But it must be executed in the name of the company. Sherman *v.* New York Central Railway, 22 Barb. 239.

If in an action of assumpsit, upon a contract, purporting to be executed by a railway company, the company claim, that it was executed under their seal, and that therefore an action of assumpsit will not lie upon it, and prevail, upon this ground, they are estopped to deny, in a subsequent action of covenant, upon the same contract, that the seal attached to the contract is the seal of the company. Philadelphia, Wilmington & Baltimore Railway *v.* Howard, 13 Howard, R. 307.

But the English courts do not hold the corporation absolutely bound by contracts under their common seal, thus reducing the question to one of authority, in fact, to enter into the contract. Shrewsbury & Birmingham Railway *v.* London & N. W. Railway; House of Lords, May, 1857, 29 Law Times, 186.

In The London Docks Co. *v.* Sinnott, 30 Law Times, 164, (Nov. 1857,) the Court of King's Bench maintain the general rule that "corporations aggregate can only be bound by contracts under the seal of the corporation." Lord *Campbell*, Ch. J., in giving judgment, enumerates the following exceptions to the general rule, mercantile contracts, contracts with customers, and such as do not admit of being executed under seal, as bills of exchange.

3 Murch *v.* The Concord Railway, 9 Foster, 9; Winterbottom *v.* Wright, 10 M. & W. 109. But a railway company owe a public duty, independent of all privity of contract, to keep their public works in such a state of repair, and so watched and tended, as to insure the safety of all, who are lawfully upon them, either by their direct permission, or mediately through contract with other parties. Sawyer *v.* Rutland & Bur. Railway, 27 Vt. R. 377. This is here thus stated by *Isham*, J.. "That duty is imposed upon the defendants at common law, and it arises, not from any contract of the parties, but from the acceptance of their charter, and from the character of the services they have assumed to perform. The obligation to perform that duty is as coextensive with the lawful use of the road, and is required as a matter of public security and safety." So an apothecary, who sold a deadly poison labelled as a harmless medicine, was held directly liable to all persons injured thereby, in consequence of the false label, without fault on their part. The liability of the apothecary arises, not out of any contract, or privity, between him and the person injured, but out of the duty, which the law imposes upon all, to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug, with such label, may

3. And while the cases recognize the duty in such companies, as carry passengers, either upon their own road, or that of other companies, by permission, or lease, to make the approaches to such road safe, at all points, where freight or passengers are usually received, this duty does not exist, in regard to a passenger, who, out of special favor, is allowed to get upon the train, at an unusual place, for receiving passengers.[3]

4. And one who, by favor, is allowed to travel upon a freight car, contrary to the usual custom of the company, is bound to be satisfied with such facilities and accommodations, as usually exist upon freight trains, as railway companies are not to be regarded, as common carriers of passengers, upon their freight trains, unless they make it an habitual business.[3]

5. It has been held that natural persons, who assume no public duties, are liable, if they suffer their property to remain in a dangerous condition; as that the occupier of land is bound to fence off a hole, or area, upon it, which adjoins, or is so close to

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have passed through many intermediate sales, before it reaches the hands of the person injured, upon the same principle, that one, who suffers a dangerous animal to go at large, is responsible for the consequences. Thomas *v.* Winchester, 2 Seld. R. 397.

In Tooney *v.* London Br. & South C. Railw. 30 Law Times, the plaintiff mistook a door at a railway station, and passing through it, instead of another, fell down a flight of steps and was hurt. There was a light over the door which he intended to pass through, and a printed notice showing the purpose of it. There was also an inscription over the other, but no light. The defendant could not read. There was no evidence that the steps were more than ordinarily dangerous. Held that the company were not liable.

Nor is a railway company liable for an injury through the defect of a crane, which they had furnished to enable the consignee of heavy goods to unlade them from the cars, although such crane was known to them to be inadequate for the use, for which it was furnished, the party injured having been employed to assist the consignee, and thereby lost his life. The case is put upon the ground of want of privity, it being admitted that the company would, in such case, have been liable to the party to whom they furnished the crane, if he or his ordinary servants had sustained injury in its prudent and lawful use. But the party here was called in for the occasion. Blakemore *v.* The Bristol and Exeter Railw. 31 Law Times, 12. It seems to us the principle of want of privity is here misapplied. This is a clear case of tort and not of contract, and the party injured, although called in for the occasion, was *pro hac vice*, a servant of the borrower, and it was the same as if the borrower himself had been injured. The furnishing the instrument had express and direct reference to its use, by the consignee, and his servants, extraordinary, as well as ordinary.

a highway, that it may be dangerous to passers-by, if left unguarded.[4]

6. The same rule has often been extended, to turnpike roads,[5] *and to plank roads, where the statute made no provision for the liability of the company.[6] And the same rule has been extended generally to railway companies, in this country, without question, so far as persons are rightfully in the use of the same.[7] It was held that the owner of a car, which was in the use of another party, upon a railway, by contract between him and the company, and suffered an injury, by reason of the bad state of the railway, might maintain an action against the company.[7]

SECTION IV.

EXTENT OF THE POWERS AND DUTIES OF LESSEES OF RAILWAYS.

1. *Statement of the points in an important English case.*
2. *Lessees of railways liable for their own acts, and for many acts of lessors.*

§ 184. 1. A very elaborate and important case, upon the relative rights and duties of the lessors and lessees of railways, came before the Court of C. B., in June, 1851, and the Exchequer Chamber, in January, 1853. The importance and difficulty of the subject, and the few cases upon that subject which have yet arisen, will justify an extended notice of the points decided in the court of last resort.[1] In 1836, a company (afterwards called

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[4] Barnes *v.* Ward, 2 Carr. & K. 661.

[5] Randall *v.* Cheshire Turnpike Co. 6 N. H. R. 147; Townshend *v.* Susquehannah T. Co. 6 Johns. R. 90.

[6] Davis *v.* Lamoille County Plank Road, 27 Vt. R. 602.

In the very recent case of Gibbs *v.* Trustees of the Liverpool Docks, 31 Law Times, 22, (Feb. 1858,) it was held, in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that it is the duty of those receiving tolls, whether as trustees or otherwise, not to allow a dock to remain open for public use, when they know that it is in such a state, that it cannot be used without danger, citing Parnaby *v.* Lancaster Canal Co. 11 Ad. & Ellis, 223, and distinguishing the case from Metcalfe *v.* Hetherington, 11 Exch. R. 257. But it seems the party is never liable in such case, unless he knew, or might have known of the defect, but for his own neglect of duty. McGinity *v.* Mayor of New York, 5 Duer, 674.

[7] Cumberland Valley Railway *v.* Hughs, 11 Penn. St. R. 141.

[1] The West London Railway *v.* The London and N. W. Railway, 18 Eng. L. & Eq. R. 481.

the West London Railway Company,) was incorporated by act of parliament, for the making of a railway from the Kensington Canal, to join the London and Birmingham (afterwards called the London and Northwestern,) and the Great Western Railways, at a place called Holsden Green; and certain duties were by the act cast upon the company; and, amongst other things, it was provided, that, if the railway should be abandoned, or should, after its completion, cease for the space of three years to be used as a railway, the land taken by the company for the purposes of the act should revert to the owners of the adjoining land.

In February, 1837, the West London Railway Company entered into an agreement with the Great Western Railway Company, under which the last-mentioned company bound themselves to * stop certain of their trains at a point where their railway intersected the West London Railway, for the purpose of transferring passengers and goods from one railway to the other, and to stop their trains for the purpose of meeting corresponding trains of that company, in the manner particularly detailed in the deed.

In 1840, another act, 3 & 4 Vict. c. 105, passed, giving further powers to the West London Railway Company; the thirty-fourth section, reciting the agreement of February, 1837, regulated the mode of crossing until the plaintiffs' railway should be completed; the thirty-sixth section saved the plaintiffs' right under that agreement; and the thirty-seventh section provided, that, if the plaintiffs' line was abandoned, or ceased to be used as a railway for three years after its completion, then, on payment or tender to them by the Great Western Railway Company of the purchase-money of the piece of land where the railways crossed, the said land should vest in the Great Western Railway Company.

By a subsequent act (8 & 9 Vict. c. 156), reciting, that "it had been found that the said West London Railway [which it appeared in evidence had been worked with passenger trains as well as with goods trains] could not be worked, as a separate and independent undertaking, with advantage to the proprietors thereof; but that the same might be advantageously worked and used in connection with the said London and Birmingham Railway and the said Great Western Railway, or either of them, by both or either of the companies to whom the said last-mentioned

railways belonged; that the West London Railway Company were therefore desirous of letting the said railway on lease to the London and Birmingham Railway Company; and that the last-mentioned company were willing to accept such lease, subject to certain terms and conditions which had been mutually agreed on between the said two companies,"—the West London Railway Company was authorized to lease to the London and Northwestern Railway Company their railway, and all their rights, powers, and privileges in relation thereto,—subject to the provisions of the act, and to the performance of the conditions to be mentioned in such lease.

By the lease, which was afterwards executed in pursuance of this act, the London and Northwestern Railway Company covenanted, amongst other things, that they would "at their own expense, during the continuance of the lease, efficiently work and repair the railway and works thereby demised, and indemnify the West London Railway Company against all liabilities, loss, charges, and expenses, claims, and demands, whether incurred or *sustained in consequence of any want of repair, or in consequence of not working, or in any manner connected with the working of the same railway or works; but the West London Railway Company shall have no control whatever over the working or management by the London and Birmingham (Northwestern) Railway Company of the West London Railway or works. It was held:—

That, in order to perform their covenant to work efficiently, the defendants were not bound under all circumstances to work the line for passenger traffic; but that, if as much gross proceeds could be obtained by efficiently working the railway for goods only, as for passengers only, or for both passengers and goods, the covenant was well performed,—*Platt*, B., *Martin*, B., not concurring.

That the agreement of February, 1837, with the Great Western Railway Company, was, by virtue of the provisions in the leasing act, and the lease itself, transferred to the defendants, the lessees; and, consequently, that they had power to compel the Great Western Railway Company to stop trains on their line, pursuant to the provisions of that agreement. That, although the defendants had power to stop the Great Western trains, they were not bound to exercise it necessarily as a part of

the efficient working of the line demised; and that they were not bound necessarily to work the demised line, in connection with the trains, on the Great Western Railway.

That there was no covenant in the lease to bind the defendants to work the demised line in connection with either or both their own or the Great Western Railway; but that it would be for the jury to say whether or not they could practically work the line efficiently, without some connection with one or other of those railways.

That, for the purpose of considering the liability of the defendants, they were not to be treated by the jury as if they were lessees of a separate and independent line, having no control over the other two railways; but that the covenant to work the demised line efficiently, must be construed with a reference to the subject-matter, and the character of the defendants.

That the obligation of the defendants under their covenant, was not limited,—as decided by the court below, to the indemnification of the plaintiffs, from the obligations cast upon them by their acts of incorporation. The court say in substance:—

If this railway had been leased to a simple individual, or company, without any connection with any other railway, and leased alone, the measure of efficient working, we cannot help thinking, *would be very different from what would be required from a company whose line was connected with it, who had the entire control over their own line, and were armed with a power of adding to the traffic of the railway, by the control possessed over another line, and whose capabilities and powers in this respect were reasons which disposed parliament to permit the lease to be made to them.

It is difficult, indeed almost impossible, to define the precise nature and degree of efficient working, which such a company ought to apply, under this covenant; not so difficult to say that it ought to be different and greater than would be required from a company or an individual, who had nothing but the railway leased. They could only be required to supply convenient accommodation and attendance for the receipt, and sufficient means of carriage, of such goods and passengers, as might be offered at one terminus, or any intermediate station, to be carried to the other terminus, or some other intermediate station; and this, however small the gross receipt might be.

But that would be too small a measure of efficient working, in the case of these defendants, who have the power of supplying more goods and passengers themselves by facilitating the transit of both from Holsden to the Kensington terminus, or Great Western station, or by increased facilities for receiving them at the Kensington terminus, by arrangements within their power, without any serious injury to their own concern.

They are certainly not bound to make a sacrifice of their own concerns, for the purpose of efficiently working this line, so as to produce the greatest profit to the plaintiffs and themselves.

The covenant must have a reasonable construction in this respect. But they are, we think, bound to do more than a lessee of merely the railway in question would do, unconnected with any other.

2. It seems to be regarded as settled, that the persons, or corporation, who come into the use of a railway company's powers and privileges, are liable for their own acts, while continuing such use, and also for the continuance permissively of any wrong which had been perpetrated by such company, upon land-owners or others, by means of permanent erections, which still remain in the use of their successors.[2] Thus it has been held, that the lessees of a *railway are liable to a penalty under the statute, for not having a bell upon their engines, and not ringing it, as required by the statute.[3] But the lessees of a railway are not liable for the acts of the servants of the lessors.[4]

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[2] In regard to the construction of contracts between different companies for the mutual use of each other's line, or the line of one road by the other, tolls, &c. see The Lancashire and Yorkshire Railway *v.* The East L. Railway, 8 Eng. L. & Eq. R. 564; s. c. reversed in Exchequer Ch., 25 Eng. L. & Eq. R. 465; and affirmed H. Lords, 36 Eng. L. & Eq. R. 34. It was held in a late Scotch case, on appeal in the House of Lords, that under an act of parliament requiring one company to accept a lease of and operate the other's road, so soon as it was in readiness, the lessees were bound to accept any reasonable portion of the road so soon as completed, it being such a portion as might be worked with advantage. Edinburgh & G. Railway *v.* Stirling & D. Railway, 22 Law T. 26; Brown *v.* The Cayuga & Susquehanna Railway, 2 Kernan, 486.

[3] Linfield *v.* Old Colony Railway, 10 Cush. 562.

[4] Walford on Railways, 184, citing two cases not reported.

SECTION V.

CONTRACTS BETWEEN DIFFERENT COMPANIES REGULATING THE TRAFFIC.

§ 185. It seems in general to have been considered, that contracts between different connecting companies, with a *bonâ fide* view to regulate traffic, in a reasonable and just manner, were legal and binding.[1] But when it is considered, that these companies have to a very great extent a monopoly of the traffic, and travel, of the country, the power to regulate fares, and freight, by arrangement between the different companies, is certainly one very susceptible of abuse. But there is ordinarily very little danger, that they will willingly incur the serious reprobation of public opinion. And it has sometimes been doubted whether contracts, whereby one railway company seeks to assume the entire business of other companies, affording them a guaranty in regard to stock and profits, or either, could be regarded, as coming within the fair *interpretation of the English general statutes, allowing one company to contract for running upon the track of other companies, for tolls, and so could be held valid, by the courts of that country, either in law or equity.[2] But some of the later cases seem to sustain such contracts.[3]

SECTION VI.

WHAT IS REQUISITE TO CONSTITUTE A PERPETUAL CONTRACT, BETWEEN DIFFERENT RAILWAY COMPANIES.

§ 186. Where in the charter of a railway company, a right is

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[1] Shrewsbury & Birm. Railway *v.* London & N. W. Railway, 9 Eng. L. & Eq. R. 394. Lord *Campbell* says here, That if the object of the contract were to create a monopoly, and to deprive the public of all benefit of competition, it might be illegal, but an agreement, that one company shall not interfere, or compete, with the other, is no more illegal, than a contract, by which one tradesman, or mechanic, agrees not to continue his business, in a particular place. Same case in chancery, before Lord *Cottenham*, 2 Mac. & Gordon, 324, where a similar view is taken of the legality of the contract. Lord *Langdale*, M. R., in Colman *v.* The Eastern Counties Railway, 4 Railw. C. 513.

[2] Simpson *v.* Denison, 13 Eng. L. & Eq. R. 359.

[3] *Ante*, § 181.

reserved to the legislature, to allow other railways to connect with the former, upon such terms, as shall be reasonable, complying with the established regulations of such company upon the subject, and in pursuance of such reservation a junction is made by a second railway company with the first, which, in faith of such connection, proceeds to make expensive, and permanent arrangements for the accommodation of the enlarged business thus brought upon its track, it was held, that this imposed no obligation upon the second company to continue this connection permanently. And also that the second company might lawfully obtain an extension of their own road, so as to do their own business, without continuing the connection.[1]

SECTION VII.

CONTRACTS BY RAILWAYS ULTRA VIRES, AND ILLEGAL.

1. *Contracts to make erections not authorized by their charter.*
2. *Contracts to indemnify other companies against expense.*
3. *Contracts to divide profits.*

§ 187. 1. It has been considered, that a contract, by a railway company, with the corporation of a city, by which the company bind themselves to erect a bridge, and other accessory works, across a river, at a point where, by their charter, they are not authorized * to pass, and to do this by a definite time, and in default, to pay one thousand pounds, as liquidated damages, such works being, without an act of parliament, a nuisance, is an illegal contract, and equally so notwithstanding a stipulation, that the company shall in the mean time exert themselves, to obtain an act, authorizing the erections.[1]

2. And where the chairman of the Southeastern Railway Company promised the managing committee of a proposed railway company, that in consideration of their not abandoning their project, but pursuing it in parliament, the Southeastern Railway Company would, in case of their bill being rejected, insure the company, of which they were the managing committee, against all loss, and would pay all expenses incurred by

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1 Boston & Lowell Railway *v.* The Boston & Maine Railway, 5 Cush. 375.

1 The Mayor of Norwich *v.* The Norfolk Railway, 30 Eng. L. & Eq. R. 120.

them, in endeavoring to obtain the act; and the Southeastern Railway Company were authorized, by their acts, to apply their funds, in certain ways, not including this: it was held,[2] that the agreement was void, as it was an agreement made by contracting parties (who must be presumed to know the powers of the defendants' company, by their acts of parliament, which are public acts) that the company should do an act, which was illegal, contrary to public policy, and the provisions of the statutes.[3]

3. And a contract by which one railway agrees to give up to another railway a part of its profits in consideration of securing a portion of the profits of the other company, is illegal, and *ultra vires*.[4]

SECTION VIII.

COMPANIES EXONERATED FROM CONTRACTS, BY ACT OF THE LEGISLATURE.

§ 188. It seems to be conceded, that a railway company may plead a subsequent act of the legislature, in bar of the performance * of their covenant, or contract. But it will afford no bar, unless the act either expressly, or by clear implication, renders the duty of the contract unlawful, or comes in conflict with it.[1]

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2 McGregor *v.* The Official Manager of the Deal & Dover Railway, 16 Eng. L. & Eq. R. 180, in Exchequer Chamber. See also East Anglian Railways Co. *v.* Eastern Counties Railway, 7 Eng. L. & Eq. R. 505, where the same question, in effect, is determined. *Post*, Appendix A, § 16.

3 *Ante*, § 56, n. 3.

4 Shrewsbury & Birmingham Railway *v.* London & Northwestern Railway, House of Lords, May, 1857; 29 Law Times, 186.

1 Wynn *v.* The Shropshire Union Railway & Canal, 5 Exch. R. 420; Stevens *v.* South Devon Railway, 12 Eng. L. & Eq. R. 229. But where one was induced to give lands to a railway company, or subscribe for stock, and the essential inducement to make the contract was, that the company should construct their road within some definite time, the extension of time for the construction of the road, by act of the legislature, will not exonerate the company from their obligation to such person. Henderson *v.* Railway Company, 17 Texas R. 560.

SECTION IX.

WIDTH OF GAUGE. JUNCTION WITH OTHER ROADS.

1. *Where the act requires broad gauge, does not prohibit mixed gauge.*
2. *Permission to unite with other road, signifies a road* de facto.
3. *Equity will enjoin company against changing gauge sometimes.*
4. *Contract to make gauge of the companies the same, although contrary to law of state, at its date, may be legalized by statute.*

§ 189. 1. Where the company's special act required them to lay down a railway of such gauge and construction, as to be worked in connection with another company named, (the broad gauge,) a court of equity declined to interfere, by injunction, when the company were laying down part of the line, with double tracks, of the mixed gauge, there being no prohibition in the act against such a construction, the broad gauge being all which was required by the act.[1]

2. Where the act of incorporation gave the company the right to construct a road, in a particular line, and also required them to purchase a former railway, along the same route, and gave them the right to connect "their road with any road legally authorized to come within the limits of the city of Erie," it was held, that this right extended equally to the road purchased, or built, by them, and that they had the right to connect, with any other railway, in the actual use of another company in Erie, without inquiry, whether such company were in the legal use of their franchises, at the time, or not. That is a question, which cannot be inquired into, in this collateral manner.[2]

3. Where two railway companies agree to operate their roads in connection, between certain points, if one of the companies * changes its gauge, so as to break up the connection contemplated, an injunction will be granted to enforce the contract.[3]

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1 Great Western Railway *v.* Oxford, Worcester, & Wolverhampton Railway, 10 Eng. L. & Eq. R. 297.

2 Cleveland, Painsville, & Ashtabula Railway *v.* The City of Erie, 27 Penn. St. R. 380.

3 Columbus, Piqua & Ind. Railway *v.* Ind. & Bellef. Railway, 5 McLean's R. C. C. 450.

4. A contract entered into by railway companies to make the gauge of both the companies the same, is not illegal, although this be contrary to the law of one of the states, if the contract appear to have been made with reference to an alteration of the powers of the company, in that respect, and that such alteration was procured, before any part of the track was laid.[3]

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*CHAPTER XXV.

MANDAMUS.

SECTION I.

GENERAL RULES OF LAW GOVERNING THIS REMEDY.

1. *Regarded as a supplementary remedy.*
2. *Mode of procedure.* (1.) *Matter of discretion.* (2.) *Alternative writ.*
3. *Proceedings in most of the American courts.*
4. *English courts do not allow application to be amended.*
5. *Recent English statute has essentially simplified proceedings.*
6. *Mode of trying the truth of the return.*
7. *Costs rest in the discretion of court.*
8. *Mode of service.*
9. *By late English statutes, mandamus effects specific performance.*

§ 190. 1. THE office of the writ of mandamus is very extensive. It is the supplementary remedy, where all others fail. Lord *Mansfield* says,[1] "It was introduced to prevent disorder, from a failure of justice and defect of police. Therefore it ought to be used, upon all occasions, where the law has established no specific remedy, and where in justice and good government there ought to be one." "If there be a *right* and no other specific *remedy* this should not be denied." The general rules applicable to the use, and the mode of obtaining this writ, are sufficiently discussed, in the digests, abridgments, and elementary works, under this title.[2]

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[1] Rex *v.* Barker, 3 Burr. R. 1265. See Woodstock *v.* Gallup, 28 Vt. R. 587. The same principles are declared by Lord *Ellenborough*, in Rex *v.* Archbishop of C. 8 East, 219; 6 Ad. & Ellis, 321.

[2] 12 Petersdorff, Ab. 438; 6 Bac. Ab. 309, 418, tit. Mandamus; 3 Black.

2. The mode of proceeding, in obtaining the writ, is controlled very much by statute, in England, at the present time, and in most *of the American states. There are some few points, which are of general application.

(1.) The power of granting the original prerogative writ of mandamus, in England, was confined to the Court of King's Bench,[2] and in most of the American states, it is given, by statute, to the highest court of law of general jurisdiction.[2] This prerogative writ seems anciently to have been issued to inferior jurisdictions, by the Court of Chancery, in England, but not to the King's Bench.[3] This writ is not demandable, as of right, but is awarded, in the discretion of the court.[4]

(2.) The form of application is either, by motion in court, and the production of affidavits, in support of the ground of the motion, in which case, if the motion prevails, a rule to show cause why the writ should not issue, or on alternative mandamus issues, upon the *ex parte* hearing, and the definitive hearing is had upon the return of the rule, or the return to the alternative writ.

3. The more common practice in the American courts, (which often hold but one or two short sessions annually, in a county, and where, by consequence, such formal proceedings would be attended with embarrassing delays,) is by formal petition, alleging in detail, the grounds of the application, which is served upon the opposite party, and all parties supposed to have an interest in the questions involved, a sufficient time, before the term, to give an opportunity, for taking the testimony, upon notice; and upon the return of the petition, the case is heard, upon its general merits; and in either form, if the application prevails, a peremptory mandamus issues, the only proper return to which

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Comm. 110, 264; 1 Kent's Comm. 322; Curtis's Digest, 333. And that the party may have some remedy in equity will not preclude this remedy. But see *infra*. Nor that an indictment will lie. *Post*, § 199. And it is no bar to this remedy that the party might by statute build the work, at the expense of the other party, by order of a justice. Reg. *v.* The Norwich & B. Railway, 4 Railway C. 112.

3 The Rioters' Case, 1 Vernon R. 175; Ang. & Ames on Corporations, § 697. But see R. *v.* Severn & Wye Railway, 2 B. & Ald. 646; R. *v.* Commissioners of Dean Inclosure, 2 M. & S. 80; R. *v.* Jeyes, 3 Ad. & El. 416.

4 Rex *v.* Bishop of London, 1 T. R 331, 334; Rex *v.* Bishop of Chester, id. 396, 404; id. 425; 2 T. R. 336.

is a certificate of compliance with its requisitions, without further excuse or delay.[5]

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5 Hodges on Railways, 640, 641, 642, 643, 644. It is first indispensable to demand of the party, against whom the application is to be made, to perform the duty, and the party must, it would seem, be made aware of the purpose of the demand. The King *v.* Wilts & Berks Canal Navigation, 3 Ad. & Ellis, 477; The King *v.* Brecknock & Abergavenny Canal Navigation, 3 Ad. & Ellis, 217. The refusal must be of the thing demanded, and not of the right merely. The King *v.* Northleach & Witney Roads, 5 Barn. & Ad. 978. The refusal must be direct and unqualified, but may be made as effectual, by silence, as by words, or acts, but the party should understand, that he is expected to perform the required duty, upon pain of the legal redress being resorted to, without further delay. The Queen *v.* Norwich & Brandon Railway, 4 Railw. C. 112; The Queen *v.* Bristol & Exeter Railway, 4 Q. B. 162. But this should be taken, as a preliminary question, according to the English practice. Queen *v.* Eastern Counties Railway, 10 Ad. & Ellis, 531.

Conditions precedent must be shown to have been performed.

But the mere requisition of an act of parliament that parties claiming damages, by reason of a railway company's works, shall enter into a bond to prosecute their complaint and pay their proportion of the costs, before the company should be obliged to issue their warrant to summon a jury, and if not so done, the company might give notice, requiring the same to be done, before commencing the inquiry, was held not to be a condition precedent, unless required by the company. The Queen *v.* The North Union Railway, 1 Railw. C. 729.

And where an umpire failed to make an award, it was held the company might be compelled, by mandamus, to issue a warrant for the sheriff to assess the compensation, and no formal demand was necessary. Hodges on Railways, 642, and note; South Yorkshire & Goole Railway, *in re* 18 Law Jour. (Q. B.) 53. A return stating an excuse for non-compliance with a peremptory writ of mandamus, is not admissible. Regina *v.* Ledgard *et als.* Mayor, &c. of Poole, 1 Q. B. R. 616. Application by the prosecutor for leave to withdraw his plea and argue the case on the return refused. R. *v.* Mayor of York, 3 Q. B. R. 550; Strong, Petitioner, &c. 20 Pick. R. 484.

It is the practice, for different persons, in the same or similar situation, to unite in the same application for a mandamus, and it is said but one writ can issue in such a case. Rex *v.* Montacute, 1 Wm. Black. 60; Rex *v.* Kingston, 1 Strange, 578, (n. 1); Scott *v.* Morgan, 8 Dowl. P. C. 328. But it seems to be considered that where the rights are distinct and wholly independent, one writ will not be awarded, but several, and therefore the application should be several. Reg. *v.* Chester, 5 Mod. 11; The case of Andover, 2 Salk. 433; Smith *v.* Erb, 4 Gill, (Md.) R. 437; State *v.* Chester & Evesham, 5 Halst. 292.

But several connected matters, which are not repugnant, may be included, by way of defence in the return. Reg. *v.* Norwich, 2 Salk. 436; Wright *v.* Fawcett, 4 Burrow, R. 2041; Rex *v.* Churchwardens of Taunton, 1 Cowp. 413.

Upon a mandamus to restore a corporate officer to his functions, the return should specify the grounds of the amotion. Commonwealth *v.* The Guardians

*4. The general rule of the English courts seems to be, that if the first application is denied, on account of defects in the affidavits, not to permit a second application to be made; and the rule extends to other writs, resting in the discretion of the court.[6]

*5. But the late Common-law Procedure Acts, in England, 1852, 1854, apply to this class of writs, and have essentially simplified the proceedings, and rendered them more conformable to reason and justice, than in some of the American courts even, the rule for the issuing of the alternative writ being now, in all cases, made absolute, in the first instance, and the whole hearing had, upon the return, which in our practice is still further simplified, by admitting the party to make answer to the petition, alleging the grounds of his refusal, which are tried at once.[7]

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of the Poor of Philadelphia, 6 Serg. & Rawle, 469, unless the officer were removable, upon the mere motion of the corporation. Rex *v.* Guardians of Thame, 1 Strange, 115.

[6] Queen *v.* Manchester & Leeds Railway, 8 Ad. & Ell. 413. And the same rule obtains where the first writ is denied, because no sufficient demand had been made, and a subsequent demand is made. *Ex parte* Thompson, 6 Q. B. 721. But it is apprehended no such rule of practice could be enforced in this country, and very few, we think, would regard it as desirable. It seems to be relaxing in England, where the alteration of the affidavits is mere form. Regina *v.* The G. W. Railway, 5 Q. B. R. 597, 601; Regina *v.* The East Lancashire Railway, 9 Q. B. R. 980. And in Reg. *v.* Derbyshire, S. & W. Railway, 26 Eng. L. & Eq. R. 101, the writ was amended, as to the name of the company. Reg. *v.* Eastern Counties Railway, 2 Railw. C. 736, amendment allowed. Regina *v.* Justices of Warwickshire, 5 Dowl. 382; Reg. *v.* Jones, 8 Dowl. 307; Shaw *v.* Perkins, 1 Dowl. (N. S.) 306; Reg. *v.* Pickles, 3 Q. B. R. 599, n.

[7] Walter *v.* Belding, 24 Vt. R. 658; Rogers, *ex parte*, 7 Cowen, R. 526. In the American states the statute of 9 Anne, allowing the prosecutor to traverse the return to the writ, or the answer to the petition, and for the court to determine the truth, either upon affidavit, or by the verdict of a jury, in their discretion, has been pretty extensively adopted, either in practice, or by statute. The People *v.* Beebe, 1 Barb. R. Sup. Ct. 379; The People *v.* The Commissioners of Hudson, 6 Wend. 559.

Where the case is fully heard upon the petition, or rule to show cause, and there is no dispute, in regard to the facts, the court will not delay, for the issuing of the alternative writ and the return thereto, but will in the first instance issue the peremptory mandamus. *Ex parte* Jennings, 6 Cow. R. 518; The People *v.* Throop, 12 Wend. 183. The rule for the peremptory mandamus is sometimes, in the first instance, made *nisi*, to allow the respondents to consult, if they will comply with the requirements of the judgment. Walter *v.* Belding, 24 Vt. R. 658. Or sometimes this is done to allow the parties to arrange the matter, or the court to consider the case. Rex *v.* Tappenden, 3 East, 186.

6. If falsehood is alleged in the return to the alternative mandamus, it was the practice at common law, to drive the party to his action for a false return. But by statute in England, and generally, by practice, in this country, the question is tried, in the court, issuing * the writ, and the remedy there applied, damages and costs being given, in the discretion of the court, and execution enforced.

7. Costs in all the proceedings for mandamus rest in the discretion of the court, unless controlled by statute. By the English practice it is common to award costs, where the application is denied, but not always where it prevails.[8] The more general, and the more equitable rule, in regard to costs, in proceedings, where the court have a discretion, in that respect, is to allow costs to the prevailing party, unless there is some special reason for denying them.[9]

The court have such control over their own judgments, that if a peremptory writ of mandamus be unfairly obtained, it will be set aside upon motion. The People *v.* Everett, 1 Caines's R. 8.

Courts enforce compliance with the peremptory writ, by attachment, as also a return to the alternative writ, without requiring the issue of an *alias* and *pluries*, as in the early English practice. The cases are not altogether agreed, whether defects in the writ are cured by admissions in the return, but upon general principles of pleading it would seem they are. The King *v.* Coopers of Newcastle-upon-Tyne, 7 T. R. 548. But see Reg. *v.* Hopkins, 1 Q. B. R. 161. But where an alternative mandamus is issued, and the defendants make their return, and the relators, instead of demurring, take issue upon the material allegations in the return, they thereby admit that, upon its face, the return is a sufficient answer to the case made, by the alternative writ. And if no material fact is disproved upon the trial, the defendants will be entitled to a verdict in their favor. The People *ex rel.* Kipp *v.* Finger, 24 Barb. R. 341.

8 Reg. *v.* Mayor of Bridgenorth, 10 Ad. & Ell. 66; Reg. *v.* The Eastern Counties Railway, 2 Q. B. R. 578, 579, and cases cited by counsel. Reg. *v.* East Anglian Railway, 22 Eng. L. & Eq. R. 274. 1 Wm. 4, c. 21, § 6, makes costs discretionary with the courts, in England. Regina *v.* St. Saviour, 7 Ad. & Ell. 925.

9 Reg. *v.* Thames & Isis Commissioners, 8 Ad. & Ell. 901, 905; 5 Ad. & Ell. 804; Reg. *v.* Fall, 1 Q. B. 636; Reg. *v.* Justices of Middlesex, 6 Eng. L. & Eq. R. 267, unless strong reasons for denying costs exist; 1 Q. B. R. 751.

Where the prosecutor omitted to proceed with a mandamus, after a return had been made, the Court of Queen's Bench compelled him to elect either to proceed, or pay the costs. Reg. *v.* Mayor of Dartmouth, 2 Dowl. (N. S.) 980. If the *quo warranto*, mandamus, or other like writ, is procured, by the real party in interest, who is able to pay costs, to be prosecuted, by some one, not able to pay costs, the Court of Queen's Bench will grant a rule, requiring the real party to pay costs. Reg. *v.* Greene, 4 Q. B. R. 646. See also a general rule, adopted immediately

8. Service of such process, and indeed of all process, by summons, in England, is by delivering the original, where there is but one person summoned, and where there are more than one, by showing the original, and delivering a copy, to each defendant, but *one, and the original left with such one. But service by copy of a writ of mandamus was held sufficient.[10]

9. By the latest English statutes upon the subject of mandamus,[11] any party requiring any order, in the nature of specific performance, may commence his action, in any of the superior courts of common law in Westminster Hall, except in replevin and ejectment, and may indorse upon the writ and copy to be served, that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand, which may now be enforced in such action, or separately, a writ of mandamus, commanding the defendant to fulfil any duty, in the fulfilment of which the plaintiff is personally interested. And if a mandamus is awarded it may issue peremptorily in the first instance, in aid of the execution, for damages and costs. The form of the writ is very brief, and compliance with its requisitions is to be enforced by attachment. The prerogative writ is still retained, but its use, and also, that of decrees for specific performance in equity, seem to be pretty effectually superseded by these provisions.

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after the decision of the last case, Easter Term, 1843, requiring a formal rule, for payment of costs in mandamus, to be drawn up immediately on reading all the affidavits on both sides, 4 Q. B. R. 653. The rule for costs is decided upon the reading only of the affidavits, with reference to which the rule is drawn up. Reg. *v.* St. Peter's College, 1 Q. B. R. 314, overruling Rex *v.* Kirke, 5 B. & Ad. 1089.

Counsel are, in the English practice, required to pay costs occasioned by their delay. Reg. *v.* Mayor of Cambridge, 4 Q. B. R. 801. But where the judge makes a mistake, the parties, who come to defend his ruling, which they are bound to suppose correct, do not pay costs. Reg. *v.* London & Blackwall Railway, 3 Railw. C. 409, and note.

The party who institutes proceedings for mandamus, which he is compelled to abandon, by personal misfortune, as being pauperized by the loss of his trade, must still pay costs, as the court could only conclude he had no grounds to support his petition. Reg. *v.* London & Blackwall Railway, 4 Jurist, 859. See also Morse, Petitioner, 18 Pick. R. 443.

[10] Reg. *v.* Birmingham & Oxford Railway Co. 16 Eng. L. & Eq. R. 94.

[11] 17 & 18 Vict. ch. 125.

SECTION II.

PARTICULAR CASES WHERE MANDAMUS LIES TO ENFORCE DUTY OF CORPORATIONS.

§ 191. The opinion of *Jervis*, Ch. J., in the case of York & North Midland Railway *v.* Reg.,[1] is perhaps the best commentary

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[1] 18 Eng. L. & Eq. R. 199. "Upon these facts several points arise; first, does the statute of 1849 cast on the plaintiffs in error a duty to make this railway? Secondly, if it does not, is there under the circumstances a contract between the plaintiffs in error and the land-owners, which can be enforced by mandamus? Thirdly, and failing these propositions, does a work, which in its inception was permissive only, become obligatory by part performance? These questions will be found upon examination to exhaust the subject, and to comprehend every view, in which the mandamus can be supported. In substance, do these acts of parliament render the company, if they do not make this railway, liable to an indictment, for a misdemeanor, and to actions by the party aggrieved? For if they do not, a mandamus will not lie, and thus the question depends entirely upon the construction of the special act, and the statutes incorporated therewith. The act of 1849 may cast the duty upon the plaintiffs in error, in one of two ways; it may do so by express words of obligation, or it may do so by words of permission only, if the duty can be clearly collected from the general purview of the whole statute. The words of the 3d section of the act of 1849, 'it shall be lawful for the said company to make the said railway,' are permissive only, and not imperative, and it is a safe rule of construction to give to the words used by the legislature their natural meaning, when absurdity or injustice does not follow from such a construction. Indeed, if there were any doubt upon this subject, other parts of the statute referred to in the argument clearly show that these words were intended to be permissive only. The distinction is well put by my brother *Erle:* 'The company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them; but they are commanded to make compensation for lands taken, to substitute roads for those they turn, and to perform other conditions relating to the exercise of their powers, and these matters are required of them.' It seems clear, therefore, that the duty is not cast upon the plaintiffs in error by the express words of the statute of 1849; and, indeed, it was not so urged in the argument; nor was it so put by Lord *Campbell*, in his judgment in the court below. But it does not follow, merely because the words of the 3d section are permissive only, that there is no duty cast upon the plaintiffs in error by the statute taken altogether, to make this railway. This point was not relied upon in this case in the court below, but it was made the distinct ground of a decision in another case in that court, (The Queen *v.* The Lancashire & Yorkshire Railway Co.) and was much pressed in the argument before us in support of this judgment.

"It becomes necessary, therefore, to examine the statute in its general provis-

we could give upon the present state of the English law upon this subject.

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ions, and to consider the grounds on which the Court of Queen's Bench proceeds in the case of The Queen *v.* The Lancashire & Yorkshire Railway Co. 1 E. & B. 228; 16 Eng. L. & Eq. R. 328. We agree with Lord *Campbell*, that the portion of the line between Market Weighton and Cherry Burton, to which the mandamus applies, is not to be considered as a separate railway, or even as a separate branch of a railway, but it is to be treated as if in its present direction it had been included in the act of 1846. The acts, then, taken together, in substance, recite that it will be an advantage to the public if a railway is made from York to Beverly, through Market Weighton and Cherry Burton, according to certain plans and sections deposited, as required by the practice of parliament, and referred to in the statute, and that the plaintiffs in error are willing to make that railway. On this basis the whole provisions are founded. It has been proved that the work will be advantageous to the public; it is assumed it will be profitable to the company, and that, therefore, they will willingly undertake it. Accordingly, the company are empowered to make this line. If they do make it, they may take land; but if they do take land, they must make compensation. If necessary, they may turn roads, or divert streams; but if they do, they must make new roads and new channels for the streams they alter. Similar provisions pervade the whole statute, and, throughout, the command waits upon the authority, and the distinction between 'may' and 'must' is clearly defined. But as it is manifest that such general powers must stop competition, and may, to a certain extent, be injurious to land-owners on the line, the compulsory power to take land is limited to three years, and the time for making the railway to five, after which, the powers granted to the company cease, except as to so much of the line as shall have been completed, and the land, if taken by the company, reverts, on certain terms, to the original proprietors. An argument might have been founded on the terms in which the latter provision is contained. By the 10th section of the act of 1849, it is enacted that the railway shall be completed within five years from the passing of this act. That section was not referred to in the argument for this purpose, but it might be said that these words were compulsory, and imposed a duty upon the company to make the line. The context of the section, however, when examined, shows that such is not the meaning of it. If not completed within five years, the powers of the act are to expire, except as to so much of such railway as shall have been completed. If the section were intended to be obligatory, it would not contain that exception which contemplates that the line may be made in part. It is inconsistent to suppose that the legislature would say to the company in the same section, you may complete a part only, if you can, in five years, and then as to that part the powers of the act shall continue, but you must complete the entire line in that time. Upon the whole, therefore, we find no duty cast upon the company to make this railway in any part of this act of parliament. On the contrary, the legislature seems to contemplate the possibility of the railway being made in part, or being totally abandoned. In the latter case the powers expire in three or five years; in the former, the statute remains in force as to so much of the railway as shall have been com-

*SECTION III.

MANDAMUS TO COMPEL COMPANY TO COMPLETE THEIR ROAD.

1. *English courts have required this upon a general grant.*
2. *But these cases overruled. Not required now, unless under peculiar circumstances.*

§ 192. 1. The English courts, at one time, it would seem, regarded a parliamentary grant to a railway company, as equiva-

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pleted within that time, and expires as to the residue. This provision is inconsistent with the intention to compel the company to make the entire line, as the consideration for the powers granted by the act.

"But it is said that a railway act is a contract on the part of the company to make the line, and that the public is a party to that contract, and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railway acts, in our opinion, are not contracts, and cannot be construed as such. They are what they purport to be, and no more. They give conditional powers, which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative on the companies to which they are granted. Courts of justice ought not to depart from the plain meaning of the words used in acts of parliament. When they do, they make, but do not construe, the laws. If it had been so intended, the statute should have required the companies to make the line in express terms; indeed, some railway acts are framed upon this principle; and to say that there is no difference between words of requirement and words of authority, when found in such acts, is simply to affirm that the legislature does not know the meaning of the commonest expressions. But if we were at liberty to speculate upon the intentions of the legislature when the words are clear, and to construe an act of parliament by our own notions of what ought to have been enacted upon the subject,—if, sitting in a court of justice, we could make laws, much might be said in favor of the course which, in our opinion, is taken by the legislature on such subjects. Assuming that the line, if made, would be profitable to the public, that benefit may be delayed for five years, during which time competition is suspended. On the other hand, if the line would pay, it probably will be proceeded with, unless the company having the power is incompetent to the task. Individual land-owners may be benefited by the expenditure of capital in their neighborhood, without looking to the ultimate result; but it is not for the public interest that the work should be undertaken by an incompetent company, nor that it should be begun, if, when made, it would not be remunerative. By leaving the exercise of the powers to the option of the company, the legislature adopts the safest check on abuse in either of those respects, namely, self-interest. It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error the duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only, and that there is no reason in policy or otherwise, why we should endeavor to pervert them from their natural meaning.

lent * to an agreement on their part, to build the road. To make this intelligible to the American reader, it is necessary to keep in

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"But it is said that the land-owners are in a better situation than the public at large, and that the privilege to take their own lands, is the consideration which binds the company to complete the railway. That during the currency of the three years, they are deprived of their full rights of ownership, and if not to be compensated by the construction of the railway, they would, in many cases, suffer a loss, because whilst the compulsory power of purchase subsists, they are prevented from alienating their lands or houses described in the books of reference, and from applying them to any purposes inconsistent with the claim that may be made to them by the railway company. In truth they are not prevented from so doing at any time before the notice to take their land is given, if they act *bonâ fide* in the mean time; the notice to take their lands being the inception of the contract between the land-owners and the company. But if this complaint was better founded, it does not follow because certain land-owners are subjected to temporary inconvenience for the performance of a public good, that, therefore, the company are bound to make the whole railway. If it were a contract between the land-owners and the company, it would not be just, the one should be bound and the other free. But to assert that there is a contract between the land-owners and the company, is to beg the whole question; for, on this part of the case, the question is, whether there is such a contract? As a matter of fact, we know that in many cases no such actual contract exists. Some few proprietors may desire and promote the railway, but many others oppose it, either from disinclination to the project or with a view to make better terms. With the dissentients there is no contract, unless it be found in the statute, and to the statute therefore we must look to see what is the obligation that is cast upon the company, in respect of the land-owners upon the line. As in the former case, the words upon this subject are permissive only. The company may take land; if they do, they must make full compensation. And in that state of things, if there be a bargain between the parties, what is the bargain? The company say, in the language of the statute, that the bargain is, that they shall make full compensation for the land taken, and no more; the prosecutors say, that the consideration to be paid for the land is the full compensation mentioned in the act, and also the further consideration of the construction of the entire line of railway from York to Beverly. But if this is the price which the prosecutors are to have, each land-owner is entitled to the same value, and yet by this mandamus the other proprietors on the line from Market Weighton to Cherry Burton, who perhaps are hostile to the application, are constrained to sell their lands for an inadequate consideration, namely, the full compensation and a part only of the line of railway, to which, by the hypothesis, they were entitled by the original bargain. If this were the true meaning of the statute, it would, indeed, be unjust, more so than the imposition of the temporary inconvenience to which it is said the land-owners may be subject, and to which we have already referred. But that that is not the true meaning, is clear from the words of the statute, which are permissive, and only impose the duty of making full compensation to each land-owner, as the option of taking the land of each is exercised; and further, from the section to

mind, * the English parliamentary rules, in regard to passing acts of incorporation of such companies. The promoters are required

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which we have already referred, which contemplates the total abandonment of the line, or a part performance of it, and makes provision for the return of the land to the original proprietors in certain cases. Upon this part of the case the authority of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Company, 1 Myl. & K. 154, was much pressed upon the court. Speaking of contracts for private undertakings he says: 'When I look upon these acts of parliament I regard them all in the light of contracts made by the legislature on behalf of every person interested in any thing to be done under them, and I have no hesitation in asserting that, unless that principle be applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous, and from their number and operation they so much affect individuals that I apprehend those who come for them to parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and forbear all that they are hereby required to do and forbear, as well with reference to the interest of the public as with regard to the interest of individuals.' There is nothing in that language to which it is necessary to make the least exception; indeed it is nothing more than an illustration of the obligatory nature of the duty imposed by acts of parliament, which do impose a duty with reference to other persons. In that case, the statute had secured to Mr. Blakemore the surplus water, and had commanded the company to do certain things that he might enjoy it. In discussing whether Mr. Blakemore's right under the statute was affected by his right before the statute, his lordship might well say he considered the statute the origin of Mr. Blakemore's right in the light of a contract, and the statute then under discussion containing express words of command, he might well add, that those who come for such acts of parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do. As we understand them, the words used by Lord *Eldon* in no respect conflict with the view we take of this case; but if they mean that words of permission only, when used in the class of cases under consideration, should receive a construction different from their ordinary meaning, because, if construed otherwise, they might work injustice, with great respect for his high authority, we dissent from that proposition. We agree with my brother *Alderson*, who, in Lee *v.* Milner, 2 Y. & Coll. 611, said: 'These acts of parliament have been called parliamentary bargains, made with each of the land-owners. Perhaps more correctly they ought to be treated as conditional powers given by parliament to take the lands of the different proprietors through whose estates the works are to proceed. Each land-owner, therefore, has the right to have the power strictly and literally carried into effect as regards his own land, and has the right also to require that no variations shall be made to his prejudice in the carrying into effect a bargain between the undertakers and any one else.' 'This,' he adds, 'I conceive to be the real view taken of the law by Lord *Eldon*, in the case of Blakemore *v.* The Glamorganshire Canal Company.' There re-

to prepare *plans and sections, and maps of their roads, with the line delineated thereon, so as to show its general course and di-

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mains but one further view of the case to be considered, and that we have partly disposed of in the observations we have already made; but inasmuch as Lord *Campbell* proceeded on this ground only in the court below, although it was not much relied upon before us in the argument, we have, out of respect for his high authority, most carefully examined it, and are of opinion that the mandamus cannot be supported, on the ground that the railway company, having exercised some of their powers and made a part of their line are bound to make the whole railway authorized by their statutes.

"It is unnecessary here to determine the abstract proposition that a work which, before it is begun, is permissive, is, after it is begun, obligatory. We desire not to be understood as assenting to the proposition of my brother *Erle*, that many cases may occur where the exercise of some compulsory powers may create a duty to be enforced by mandamus; and, on the other hand, we do not say that such may not be the law. If a company empowered by act of parliament to build a bridge over the Thames, were to build one arch only, it would be well deserving consideration whether they could not be indicted for a nuisance in obstructing the river, or for the non-performance of duty in not completing the bridge. It is sufficient to say that in this case there are no circumstances to raise such a duty, if such a duty can be created by the acts of plaintiff himself. The plaintiffs in error have made the principal portion of their line, and they have abandoned the residue for no corrupt motive, but because Beverly has already sufficient railway communication, and because the residue of the line passes through a country thinly populated, and if made, would not be remunerative. But it is said that the railway company are not in the situation of purchasers of land, with liberty to convert it to any purpose, or to allow it to be waste; that they are allowed to purchase it only for a railway, and having acquired it under the compulsory power of the act, there must be an obligation upon the company to apply the land to that, and to no other purpose. Subject to the qualification in the act, this is undoubtedly true. Having acquired the lands of particular land-owners, the company could not retain them by merely laying rails on the lands so taken, and we agree it never was intended that the land-owners should be left with a high mound or a deep cutting running through his estate, and leading neither to nor from any available terminus. The precaution against such a wasteful expenditure of capital may, perhaps, safely be left to the self-interest of the company, but if such work were to be done, it would not be a practicable railway, and after five years the powers of the act would expire, and the land revest in the original proprietor. It is true that he would sustain some inconvenience without the corresponding advantage of railway communication, but in the mean time he would have received full compensation in the market value of the land, and for all damage by severance or otherwise, and would receive back the land on more reasonable terms. To be a railway it must have available *termini*. When the statutes passed, all persons supposed the *termini* would be York and Beverly; and if the argument be well founded and the company are bound, if they take the land upon any portion of the railway, to complete the whole line,

rection, * and to deposit copies of the same, with the clerks of the peace; in the office of the Board of Trade; the Private Bill Office; in certain * cases, at the Board of Admiralty; and with the parish clerk of each parish, through which the proposed line passes, before parliament * assembles, and the plans are usually referred to in the charter, as defining the course of such railway, and thus become binding upon the company, although not so

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it would seem to follow that one of the proprietary, by compelling the company to take his land on the line from Market Weighton to Cherry Burton, would thus entitle himself to a mandamus to compel them to make the line from Cherry Burton to Beverly, and, the acts having expired, to apply to parliament for a renewal of their powers for that purpose. But although the *termini* were originally intended to be York and Beverly, it is plain that the legislature contemplated the possibility of the line being abandoned or being only partially made, because in the one case the powers of the act were to cease, and in the other they were partially continued. An option, therefore, is given to some one. By the course taken, the Court of Queen's Bench has exercised that option, and said the line is to be made, not to Beverly, but to Cherry Burton. In our opinion that option is left to the company, and the company having *bonâ fide* made an available railway over the land taken, the obligation to the land-owner has, in that respect, been fulfilled. The cases upon this subject are very few, and the absence of authority is very striking, when we remember how many acts have passed *in pari materia*, not only for railways, but also for bridges and turnpike roads. Notwithstanding the numerous occasions on which such proceedings might have been taken, and the manifest interest of land-owners to enforce their rights, no instance can be found of an indictment for disobeying such a statute, or of a mandamus for the purpose of enforcing it. If correctly reported, Lord *Mansfield* determined this point in The King *v.* The Proprietors of the Birmingham Canal, 2 Wm. B. 708, for he says the act imports only an authority to the proprietors, not a command. They may desert or suspend the whole work, and, *à fortiori*, any part of it. On the other side, the language of Lord *Eldon* in Blakemore *v.* The Glamorganshire Canal Company, is referred to as an authority for this mandamus. In our opinion it does not bear that construction, although it appears that the Court of Queen's Bench took a different view of that authority in the case of The Queen *v.* The Eastern Counties Railway Company, 10 Ad. & Ell. 531, and was inclined to act upon it, and award a mandamus. The writ was subsequently withheld, in that case, on another ground, but Lord *Denman* seems to have been of opinion that on a fit occasion a mandamus ought to go. That and the recent cases in the Queen's Bench, now under discussion, are the only cases which bear upon the subject. We feel that Lord *Denman* and Lord *Campbell* are high authorities upon this or any other matter, and are both equally entitled to the respect of this court; but we are bound to pronounce our own judgment, and, after the most careful consideration, are of opinion that the judgment ought to be for the plaintiffs in error. The result is, that the judgment of the court below must be reversed.

regarded, unless so referred to.[1] Specific notice too is to be served upon each land proprietor, whose land is to be taken.[1] There is therefore some plausibility, in regarding the obtaining of a charter, under these circumstances, as a binding obligation, on the part of the company, that they will build the road. No act of incorporation of a railway is passed, in the British parliament, until three fourths of the estimated outlay is subscribed. Accordingly, in some of the earlier cases, upon this subject, after considerable discussion and examination, it is laid down,[2] that when a railway company have obtained an act of parliament, reciting that the proposed railway will be beneficial to the public, and that the company are willing to execute it, and giving them compulsory powers, upon landholders, for that purpose, and in pursuance of such powers the company have taken land, and made part of their line, they are bound, by law, to complete such line, not only to the extent, which they have taken lands, but to the furthest point. And this is so * held in some cases, although the statute enacts only, that it shall be lawful for them to make the railway.

2. So also in another case,[3] where the undertaking was not yet entered upon, it was held that the company under such circumstances were bound to execute the work, from the time when such act receives the royal assent. And in another case,[4] where, by the return to the writ, it appeared, that the company had no

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[1] Hodges on Railways, 18, and notes; North British Railway Company *v.* Tod, 4 Railway Cas. 449; Regina *v.* The Caledonian Railway Co. 3 Eng. L. & Eq. R. 285.

[2] The Queen *v.* The York & North Midland Railway Co. 16 Eng. L. & Eq. R. 299. This case was decided by a divided court, *Erle*, J., dissenting, whose opinion ultimately prevailed, in the Exchequer Chamber. Lord *Campbell*, Ch. J., and the majority of the court, founded their opinion chiefly, upon the celebrated judgment of Lord *Eldon*, in Blakemore *v.* The Glamorganshire Canal Navigation, 1 Mylne & Keen, 154. See also Reg. *v.* Ambergate, &c. Railway Co. 23 Law Times, 246; Reg. *v.* Eastern Counties Railway, 1 Railw. C. 509. But the writ was held defective in this case, in not alleging that the company had abandoned or unreasonably delayed the work. Reg. *v.* Same, 2 Railw. C. 260.

[3] Regina *v.* The Lancashire & Yorkshire Railway Co. 16 Eng. L. & Eq. R. 327.

[4] Regina *v.* Great Western Railway Co. 16 Eng. L. & Eq. R. 341. The extreme to which this very questionable doctrine was pushed, in this case, seems to have proved, as is not uncommon, in such cases, the point of departure, for its entire overthrow and abandonment.

sufficient funds to build the road, and that the period for exercising their compulsory powers, in obtaining lands, had expired, and that the building of the road had thus become impossible, it was held that a mandamus must nevertheless be awarded. Writs of peremptory mandamus issued, in each of the foregoing cases. But the first, and last, of these three cases, came before the Exchequer Chamber, and were heard, at great length, before all the judges, and an elaborate opinion delivered by *Jervis*, Ch. J., of the C. B., reversing the judgment of the Q. B., chiefly on the ground, that there was no implied obligation, upon the company, either before or after entering upon the work, to complete it.[5]

*SECTION IV.

IN WHAT CASES THIS IS THE PROPER REMEDY.

1. *Where the act is imperative upon the company to build road.*
2. *Mandamus more proper remedy than injunction.*
3. *Commissioners of public works not liable to this writ.*
4. *Public duties of corporations may be so enforced.*
5. *Facts tried by jury. Instances of this remedy.*
6. *Cannot be substituted for* certiorari, *when that is taken away.*
7. *Requiring costs to be allowed.*
8. *Other instances of its application.*
9. *Lies where the duty is clear, and no other remedy.*
10. *Not awarded to control legal discretion.*
11. *Does not lie to try the legality of an election.*

§ 193. 1. But although it must be regarded, as now definitively settled, that the writ will not lie, in any case, coming within the *categories laid down in the foregoing opinion of *Jervis*, Ch. J., yet where the act of the legislature is imperative upon the company to build their road, this duty will still be enforced, by mandamus.[1]

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[5] York and North Midland Railway Co. *v.* Regina, 18 Eng. L. & Eq. R. 199; Great Western Railway Co. *v.* Same, id. 211. These decisions, rendered (in April, 1853,) one of which is given at length in the last section, seem to have been acquiesced in, and they certainly conform to what has ever been regarded, as the law, upon that subject, in this country.

[1] Hodges on Railways, 656, in note; Great Western Railway Company *v.* Reg. Excheq. Ch. 1853. 18 Eng. L. & Eq. R. 211. The land-owners are so far interested in the building of a railway as to be entitled to bring the petition, and different owners of land may join. Reg. *v.* York and North Midland Railway,

2. But it has been held that such public duty cannot be enforced, by injunction, at the suit of the attorney-general.[2] Corporations have been compelled to perform duties, imposed by statute, by writ of mandamus for a very long time. A turnpike company was compelled to fence its road, where it passed through the land of private persons, and it was held no excuse that the company had made satisfaction for the damages, awarded to the land-owner, or that, having completed their road, they had no funds with which to build the fences.[3]

3. But it has been held, that Commissioners of Woods and Forests, who gave notice, that they intended to take certain lands, in order to ascertain, if they could be obtained, at a certain price, and finding, by the claim of the land-owners, that the land could not be obtained, so as to bring the amount to be expended, within the legislative limit, and the funds, at the disposal of the commissioners, abandoned their notice, could not be compelled, by mandamus, to take the land, such commissioners acting in a public capacity, although the rule is otherwise as to private railway companies.[4]

*4. Public duties of corporations have been enforced by mandamus, as repairing the channel and banks of a river, which, by their charter, they had been permitted to alter.[5] Also to make

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16 Eng. L. & Eq. R. 299. But it has been held, that a land-owner could not apply, for an injunction, to restrain a railway company, from applying for an act of the legislature repealing a former act, and to restrain them from paying back deposits. Hodges on Railways, 657, note; Anstruther *v.* East Fife Railway, 1 McQueen, 98. Nor can a land-owner maintain a suit in equity against a company for not completing their line, in pursuance of their act of incorporation. Heathcote *v.* North Staffordshire Railway Company, 6 Railw. C. 358. The Lord Chancellor here held, reversing the opinion of the Vice-Chancellor, that in such case, a court of equity will leave the party to his legal rights.

2 Attorney-General *v.* Birmingham and Oxford Junction Railway, and two other Companies, 7 Eng. L. & Eq. R. 283.

3 Reg. *v.* Trustees Luton Roads, 1 Q. B. R. 860. Lord *Denman*, Ch. J., said, "The law orders these parties to perform the duty if they build the road." *Patteson*, J., said, "If they had not adequate funds they ought not to have made the road."

4 Reg. *v.* Commissioners of Woods and Forests, 15 Q. B. R. 761; *post*, App. B. § 88.

5 Reg. *v.* Bristol Dock Company, 1 Railw. C. 548, 2 Q. B. R. 64, 2 Railw. C. 599. A return that the law imposed no such duty, but that they had performed it, "as near as circumstances permitted," is insufficient, as being a traverse of

alterations in the sewers of a city; and where, in the act of parliament, this duty is defined, "to make such alterations and amendments in the sewers, as may be necessary in consequence of the floating of the harbor," it was held this was a proper form for the command of the writ.[6] Also to restore a highway, intersected by a railway, to its former width.[7]

5. In the English practice questions of fact, arising on a mandamus, are tried by a jury.[8] So a railway company may, by mandamus, be required to establish an uniform rate of tolls.[9] And also to proceed in the appraisal of land damages, after giving notice to treat.[10] So the sheriff, or officer who holds the inquisition, may be compelled to proceed, where he has no legal excuse, as where such officer assumed to direct a verdict against the claim, on the ground the applicant could not recover.[11]

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the law, or an evasion of the writ. Reg. *v.* Caledonian Railway, 3 Eng. L. & Eq. R. 285.

[6] The King *v.* The Bristol Dock Company, 6 Barn. & Cress. 181.

[7] Reg. *v.* Birmingham and Gloucester Railway, 2 Railw. C. 694; 2 Q. B. R. 47; Reg. *v.* Manchester and L. Railway, 1 Railw. C. 523; 3 Q. B. R. 528; 2 Railw. C. 711. But in some cases it is requisite the duty should be strictly defined. Reg. *v.* The Eastern Counties Railway, 3 Railw. C. 22; 2 Q. B. 569.

[8] Reg. *v.* London & Birmingham Railway, 1 Railw. C. 317; Reg. *v.* Manch. and Leeds Railway, 2 Railw. C. 711; Reg. *v.* Newcastle-upon-Tyne, 1 East, 114.

[9] Clarke *v.* L. & N. Union Canal, 6 Q. B. R. 898. But in this case judgment was given for defendant, by reason of the "insufficiency of the writ."

[10] *Post*, App. B. § 88, 99, *et seq.* and cases there cited.

[11] Walker *v.* The London and Blackwall Railway, 3 Q. B. R. 744. In Carpenter *v.* County Comm. of Bristol, 21 Pick. 258, which was where county commissioners refused to assess damages sustained in consequence of constructing a railway, on the ground that the party applying did not own the land, and also refused to grant a warrant for a jury to revise their judgment, as required by R. S. ch. 39, § 56: Held, that the party was entitled to a jury to revise, and that a mandamus would lie to compel the commissioners to grant a warrant.

The court say, "Were application made to county commissioners to estimate damages caused by the laying out of a railroad, turnpike, or highway, the duty required of them would be a judicial duty. If they refused or neglected to perform it, this court would issue a mandamus commanding them to do it, that is, to exercise their judgment on the matter. But when they had performed this duty, it being within their discretion, no other tribunal would have a right to interfere with, or complain of, the manner in which they had performed it." So also in Chicago, Burlington, and Quincy Railway *v.* Wilson, 17 Illinois, 123, it was held, that upon application to a judge, to appoint commissioners to condemn land, for the use of a railway, he is compellable to act, if a case is made under the statute. His duty is ministerial, and not judicial, and a mandamus was accordingly awarded.

*6. But where the statute in terms, takes away the remedy by *certiorari*, the court will not indirectly accomplish the same thing by mandamus.[12]

7. A mandamus was awarded requiring the presiding officer to allow costs, in a case before him,[13] for assessing land damages, including witnesses, attendance by attorney at the inquest, conferences, and briefs, but not the expenses of surveyors, as such.

8. And where the commissioners refused to assess the value of land, taken for a railway, on the ground, that the prosecutor had no title to the same, it was held, that he is entitled to have their judgment revised, by a jury, and a mandamus will lie, on his behalf, to compel the commissioners to grant a warrant for a jury.[14] And a mandamus will issue, at the suit of supervisors of a town, to compel a railway to build a highway,[15] or bridge,[16] for public use.

9. No better general rule can be laid down upon this subject, than that where the charter of a corporation, or the general statute, in force, and applicable to the subject, imposes a specific duty, either in terms, or by fair and reasonable construction and implication, and there is no other specific, or adequate remedy, the writ of mandamus will be awarded. But if the charter, or the general law of the state, affords any other specific and adequate remedy, it must be pursued."[17]

So, too, it must be a complete and perfect legal right, or the *court will not award the writ.[18] And the writ of mandamus is

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12 The King *v.* The Justices of West Riding of Yorkshire, 1 Ad. & Ell. 563.

13 The King *v.* The Justices of the City of York, 1 Ad. & Ell. 828; Reg. *v.* Sheriff of Warwickshire, 2 Railw. C. 661.

14 Carpenter *v.* Bristol, 21 Pick. 258. See Smith *v.* Boston, 1 Gray, 72.

15 Whitmarsh Township *v.* Phil., Ger. & N. Railway Co. 8 Watts & Serg. 365.

16 Cambridge & Somerville *v.* Charlestown Branch Railway, 7 Met. 70.

17 Rex *v.* Nottingham Old Waterworks, 6 Ad. & El. 355; Dundalk Western Railway *v.* Tapster, 1 Q. B. R. 667; Corregal *v.* London & Blackwall Railway, 3 Railw. C. 411; The People *v.* The Corporation of New York, 3 Johns. Cas. 79. It seems to be considered, that *quo warranto* will not lie to an eleemosynary corporation, and therefore mandamus is the necessary remedy to correct abuses. 2 Kyd on Corporations, 337, n. a. In King *v.* Dr. Gower, 3 Salk. 230, it was held mandamus was not the proper remedy to try the right. Rex *v.* Bank of England, Douglas, R. 524; Shipley *v.* Mechanics Bank, 10 Johns. R. 484; The State *v.* Holiday, 3 Halst. R. 205; Asylum *v.* Phenix Bank, 4 Conn. R. 172.

18 Rex *v.* Archbishop of Canterbury, 8 East, 213; People *v.* Collins, 19 Wend. R. 56; 1 Wend. 318; Napier, *ex parte*, 12 Eng. L. & Eq. R. 451.

never awarded to compel the officers, or visitors of a corporation, who have discretionary powers, to exercise such powers according to the requisitions of the writ, but to compel them to proceed and exercise them, according to their own judgment, in cases where they refuse to do so.[19] If the visitor or trustee be himself the party interested in the exercise of the function, it is said to form an exception.[20]

11. But in a recent case,[21] it is said to be an inflexible rule of law, that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office, can only be tried by proceeding on a *quo warranto* information. A mandamus will not lie, unless the election can be shown to be merely colorable.

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[19] Rex *v.* Bishop of Ely, 1 Wm. Black. 81; Reg. *v.* Dean & Chapter of Chester, 15 Q. B. R. 513; Appleford's case, 1 Mod. 82. Lord *Hale's* opinion cited with approbation by Lord *Campbell*, Ch. J., 15 Q. B. R. 520; Rex *v.* Bishop of Ely, 2 T. R. 290; Murdock's Appeal, 7 Pick. R. 322; *Parker*, Ch. J., Attala County *v.* Grant, 9 Sm. & Mar. 77; Towle *v.* The State, 3 Florida, R. 202; 2 Q. B. R. 433; *Ex parte* Benson, 7 Cow. 363, and cases cited, 3 Binney, 273; 5 id. 87; 6 id. 456; 5 id. 536; 2 Penn. R. 517; 5 Wend. 114; 10 Pick. R. 244; 13 Pick. 225; 24 id. 343; People *v.* Columbia C. P., 1 Wend. R. 297.

But the officers of a municipal corporation will be compelled to hold a court, for the revision of the list of burgesses, notwithstanding the time for holding the same, in compliance with the terms of the statute, had elapsed, and notwithstanding the mayor at the time of granting the mandamus, was not the same person, who acted at the court. Regina *v.* Mayor & Assessors of Rochester, 30 Law Times, 73.

But it was held, in Heffner *v.* Commonwealth, 28 Penn. St. R. 108, that the plaintiff in the proceeding must show a specific legal right, which had been infringed; and that the damage, which the petitioner suffered, in common with other citizens, by the neglect of a municipal corporation to lay out an alley, although by reason of his land lying adjacent, he was specially exposed to suffer loss, by the neglect, would not entitle him to demand the writ: that the injury sustained by the petitioner must not only be different, in amount, or degree, but must be different, in kind, from that which falls upon the public in general, by the grievance complained of, to entitle him to the writ. The suit should be prosecuted by some public officer, for the redress of an omission of duty affecting only the public interest, and that of individuals, incidentally.

So also where the party is entitled to costs, in a proceeding before commissioners to estimate land damages, against a railway, unless the duty to award such costs, is one which is plain and obvious, it will not be enforced by writ of mandamus. Morse, Petitioner, 18 Pick. R. 448.

[20] Reg. *v.* Dean & Chapter of Rochester, 6 Eng. L. & Eq. R. 269.

[21] Reg. *v.* Mayor, &c. of Chester, 34 Eng. L. & Eq. R. 59.

SECTION V.

PROPER EXCUSES, OR RETURNS TO THE WRIT.

1. *Company may return that powers had expired at date of writ.*
2. *May show want of funds to perform duty.*
3. *But cannot show that road is not necessary, or would not be remunerative.*
4. *May quash part of return, and require answer to remainder.*
5. *Counsel for writ entitled to begin and close.*
6. *Cannot impeach the statute, in reply to the writ.*
7. *Peremptory writ cannot issue till whole case tried.*
8. *Will not quash return summarily.*
9. *No excuse allowed for not complying with peremptory writ.*

§ 194. 1. It seems to be an unquestionable answer to the writ *of mandamus to compel the company to complete their road, that the time for taking lands under the act had expired at the time of issuing the alternative writ, so that it had become impossible to build the road, as required in the writ.[1] But where, at the time of the service of the alternative mandamus, the company had time to institute compulsory proceedings, for taking lands, it was held, that if, instead of doing so, they attempted to defend the writ, and failed, it was at their peril, and the court would not excuse them, upon the ground, that in the mean time, their compulsory powers had expired.[2]

2. And where it was attempted to defend against the writ, on the ground, that it was not shown, that the company had funds, the court said, in the last case referred to: "We shall presume that the company have funds." But it would seem that the want of funds, and of the ability to obtain them, if shown on the return to the alternative mandamus, might be an excuse.[3]

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[1] Regina *v.* London & N. W. Railway, 6 Eng. L. & Eq. R. 220, denying the authority of Reg. *v.* Birmingham & Gloucester Railway, 2 Q. B. R. 47, upon this point, as justifying the writ. And in the former case it was held, the prosecutors were guilty of laches in not sooner applying for the writ.

[2] Reg. *v.* York, Newcastle & Berwick Railway, 6 Eng. L. & Eq. R. 259; Reg. *v.* Lancashire & Yorkshire Railway, 6 Eng. L. & Eq. R. 265; Reg. *v.* G. W. Railway, 18 Eng. L. & Eq. R. 364. In this case it was held, that the return must show that the company's compulsory powers for taking land had expired, and that they could not obtain the necessary land, without exercising those powers.

[3] Lord *Campbell*, Ch. J., in Regina *v.* London & N. W. Railway, 6 Eng. L. & Eq. R. 220; Reg. *v.* Ambergate, &c. Railway, 18 Eng. L. & Eq. R. 222. In Reg.

And the company are not estopped from making this plea, by reason of having, in some instances, exercised their compulsory powers of taking land.[4]

3. But it is no sufficient excuse, that the road has become unnecessary, or that it would not prove remunerative, or that, in all reasonable probability, the funds, which will come to the hands of the company, will prove inadequate to the completion of the work.[5]

4. By the English statute the court may quash part of a return to the writ which is bad in law, and put the prosecutor to plead to, * or traverse the remainder. But if the grounds of defence to the writ be repugnant, the court may, upon that ground, quash the whole.[6]

5. The counsel for the crown are allowed to begin, although the return may be in the nature of a demurrer to the writ.[7] The validity of the writ may be impeached on the return.[8]

6. In a case where the approaches to a bridge across a railway were not of the width required by the special act, a return to the writ of mandamus, that they were as convenient to the public, as the original road, or as they could be made, in execution of the powers of the act, and that to widen them, to the dimensions defined in the act, would require more land, and that their powers for taking land compulsorily had expired, before they were called upon to widen these approaches, is bad.[9]

7. The peremptory writ will not be issued until all the matters contained in the alternative writ are finally determined in favor of the application.[10]

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v. Eastern Counties Railway, 10 Ad. & Ellis, 531, it was considered no objection to granting the writ that the company had not the requisite funds, and could not raise them, without a new act.

[4] Regina *v.* Ambergate, &c. Railway, 18 Eng. L. & Eq. R. 222.

[5] Reg. *v.* York & N. M. Railway, 16 Eng. L. & Eq. R. 299, not reversed upon these points. Reg. *v.* L. & Y. Railway, 16 Eng. L. & Eq. R. 327.

[6] 9 Anne, c. 20; Reg. *v.* Mayor of Cambridge, 2 T. R. 456; 4 Burrow, 2008; Rex *v.* Mayor of York, 5 T. R. 66.

[7] Reg. *v.* St. Pancras, 6 Ad. & Ellis, 314; State *v.* Directors of Bank, 28 Vt. R. 594.

[8] Clarke *v.* Leicestershire & Northamptonshire Canal Co. 3 Railw. C. 730.

[9] Reg. *v.* Birmingham & Gloucester Railway, 2 Railw. C. 694; Rex *v.* Ouse Bank Commissioners, 3 Ad. & Ellis, 544.

[10] Reg. *v.* Baldwin, 8 Ad. & Ellis, 947. This was where the alternative writ required two sums of money to be paid, and it had been found that one of the

8. The court will not quash a return summarily, or order it taken off the file, unless it is frivolous, so as to be an obvious insult, and contempt of court.[11]

9. No excuse for non-compliance with a peremptory writ of mandamus is admissible.[12] It is no ground of objection to a mandamus, that a requisition is made on parties in the alternative, to do one of three things, if the duty enjoined by the act of parliament forms one of them, and there has been a general refusal to comply with the requisition.[13] And the demand for the rate in this case was held sufficient, notwithstanding the churchwardens required the vestry to lay the rate, or do another act, which last was illegal.[13]

*SECTION VI.

WHERE THE ALTERNATIVE WRIT REQUIRES TOO MUCH, IT IS BAD, FOR THAT WHICH IT MIGHT HAVE MAINTAINED.

§ 195. It seems to be well settled, in the English practice, that if the writ issue, in the first instance, for some things, which defendant is not bound to do; it cannot be supported, even as to those things, which he is compellable to perform.[1] But the writ may be awarded to complete such portions of their road as the company are still compellable to build, although from lapse of time, it has become impossible to build the entire road.[2]

But if the alternative writ commands more than is necessary to be done, to comply with the statute, it will be quashed, notwithstanding the party might have been entitled to this remedy, to a certain extent.[3]

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sums was due, and the inquiry was not finished in regard to the other. The court refused to grant a peremptory writ for the payment of the sum, about which the controversy was ended.

11 Reg. *v.* Payn, 3 Nev. & P. 165; The King *v.* Round, 5 Nev. & M. 427.

12 Reg. *v.* Mayor of Poole, 1 Q. B. R. 616.

13 Reg. *v.* St. Margarets, Leicester, 8 Ad. & Ellis, 889.

1 Reg. *v.* Caledonian Railway, 3 Eng. L. & Eq. R. 285; Reg. *v.* East & West India Docks & Birm. Junc. Railway, 22 Eng. L. & Eq. R. 113.

2 Reg. *v.* York & North M. Railway, 16 Eng. L. & Eq. R. 299. This case was reversed in Exchequer Chamber upon other grounds.

3 York & North Midland Railway *v.* Milner, 3 Railw. C. 774, reversing in the Exchequer Chamber, The Queen *v.* York & N. M. Railw. 3 Railw. C. 764.

SECTION VII.

ENFORCING PAYMENT OF MONEY AWARDED AGAINST RAILWAYS.

1. *The enforcement of payment of money against corporations by mandamus.*
2. *Where debt will lie, the party not entitled to mandamus.*
3. *Mandamus proper to compel payment of compensation under statute.*
4. *Mandamus not allowed in matters of equity jurisdiction.*
5. *Contracts of company not under seal enforced by mandamus.*
6. *Where a statute imposes a specific duty, an action will lie.*

§ 196. 1. It seems to have been the more general practice, to enforce the payment of money awarded against a corporation, in pursuance of a statute duty, by mandamus, where no other specific remedy is provided.[1]

*2. But it has been held that an action of debt will lie upon the inquest and assessment of compensation for land.[2] And where in granting to a railway the right to erect a bridge across the river Ouse, it was provided, in the act of parliament, that if the erection of such bridge should lessen the tolls of another bridge company, upon the same river, after a trial of three years, as compared with the three years next preceding the erection of the railway bridge, the railway company should pay to the bridge company, a sum equal to ten years' purchase of such annual decrease of tolls; it was held, that debt will lie for such purchase, and that mandamus is no more effectual remedy and ought not to be granted.[3] If the party have no right to execution, upon an award, mandamus will be awarded, otherwise not.[4]

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[1] The King *v.* Nottingham Old Waterworks, 6 Ad. & Ellis, 355; Rex *v.* Trustees of Swansea Harbor, 8 Ad. & Ellis, 439. In this case one party moved for a *certiorari* with a view to quash the proceedings, and the other for a mandamus, to carry them into effect. The rule for the former was discharged, and for the latter made absolute. Reg. *v.* Deptford Improvement Co. 8 Ad. & Ellis, 910.

[2] Corrigal *v.* The London & Blackwall Railway, 5 Man. & Gr. 219.

[3] Reg. *v.* The Hull & Selby Railway, 6 Q. B. R. 70; Williams *v.* Jones, 13 M. & W. 628. Courts of equity will not interfere where there is a remedy before sheriffs' jury. East and West India D. & B. Railway *v.* Gattke, 3 Eng. L. & Eq. R. 59.

[4] Rex *v.* St. Catherine's Dock Co. 4 Barn. & Ad. 360; Corpe *v.* Glyn, 3 B. & Ad. 801; Reg. *v.* The Victoria Park Co. 1 Q. B. R. 288. And in this case *Denman*, Ch. J., says, the court should not go beyond our extraordinary interposition by mandamus, to require a corporation to make a call upon the shareholders, to

3. So the court will not enforce an ordinary matter of contract, or right, upon which action lies in the common-law courts, as to compel common carriers to perform their public duties, or special contracts,[5] the statute not requiring them to carry all goods offered. But where compensation is claimed for damages done under a statute, the proper remedy is by mandamus, although the party may claim that the company went beyond their powers, and thus committed a wrong for which the proper remedy is an action.[6]

4. Nor will mandamus lie where the proper remedy is in equity,[7] and the right is one not enforceable at law, but only in equity, as in * matters of trust and confidence. But in a case where the act of incorporation allowed the company to sue and to be sued in the name of their clerk, it was held that execution could not issue against the clerk personally, and in giving judgment, *Tindal*, Ch. J., said: "There can be no doubt but that the funds of the trustees may be made answerable, for the amount ascertained in the action, in case of a refusal to apply them, either by a mandamus, or a bill in equity." [8]

5. And where after a rule *nisi*, for a mandamus to compel the company to summon a jury, to assess compensation to land-owners, a contract was entered into, between the land-owners, and the agent of the company, wherein they agreed upon the payment of a stated sum, and also a weekly compensation; upon the payment of the stated sum, and the execution of the contract, the proceedings were discontinued. The company paid the weekly sum for a time, and then discontinued the payment. The application for mandamus being renewed, the court held,

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pay debts, where the legislature had intrusted them with that power, and they had no standing capital.

5 *Ex parte* Robbins, 7 Dowl. P. Cases, 566.

6 Reg. *v.* North Mid. Railway, 2 Railw. C. 1; 11 Ad. & Ellis, 955; Thicknesse *v.* Lancaster Canal Co. 4 M. & W. 472; Fenton *v.* Trent & Mersey Nav. Co. 9 M. & W. 203; Rex *v.* Hungerford Market Co. 3 Nev. & M. 622.

7 Rex *v.* The Marquis of Stafford, 3 T. R. 646. See Edwards *v.* Lowndes, 1 Ellis & B. 92; 20 L. J. Q. B. 404; 16 Eng. L. & Eq. R. 204. The relation of trustee and *cestui que trust*, gives no right of action, at law, for money due. Pardoe *v.* Price, 16 M. & W. 451. The proper remedy is in equity, and mandamus will not lie. Reg. *v.* Trustees of Balby & Worksop Turnpike, 16 Eng. L. & Eq. R. 276.

8 Wormwell *v.* Hailstone, 6 Bing. 668.

that as the contract was not under their seal, no action will lie upon it, against the company,[9] and it should therefore be enforced by mandamus.[10]

6. It seems to be the general rule of the English law, that where a statute imposes a specific obligation, or duty, upon a corporation, an action will lie to enforce it, founded upon the statute, either debt or case, according to the nature of the claim.[11]

SECTION VIII.

THE WRIT SOMETIMES DENIED IN MATTERS OF PRIVATE CONCERN.

1. *Mandamus denied to compel company to divide profits.*
2. *Allowed to compel production and inspection of corporation books.*
3. *Will compel the performance of statute duty, but not to undo, what is done.*
4. *Allowed to compel the production of the register of shares, or the registry of the name of the owner of shares, and in other cases.*
5. *It is the common remedy for restoring persons to corporate offices of which they are unjustly deprived.*

§ 197. 1. Where the charter and subsequent acts, relating to *the Bank of England, required the corporation, to divide their profits semi-annually, a mandamus to compel the production of the books of the company, so as to show an account of their net income and profits, since the last dividend was declared, more than six months having elapsed, was denied.[1] *Abbott*, Ch. J., said, it was in effect "an application, on behalf of one of several partners, to compel his copartners, to produce their accounts of profit and loss, and to divide their profits, if any there be." It was also said, that this might very properly be done in a Court of Chancery, but a court of law, is a very unfit tribunal, for such a subject. "A mere trading corporation differs materially from those, which are intrusted with the government of cities and towns, and therefore have important public duties to

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9 Reg. *v.* Mayor of Stamford, 6 Q. B. R. 433.

10 Reg. *v.* Bristol & Exeter Railway, 3 Railw. C. 777. This seems to us rather a refinement. If the contract was really obligatory upon the company, it might as well be the foundation of an action, as to be enforced by mandamus.

11 Tilson *v.* Warwick Gas-Light Co. 4 B. & Cres. 962; Carden *v.* General Cemetery Co. 5 Bing. (N. C.) 253.

1 Rex *v.* The Bank of England, 2 B. & Ald. 620.

perform." *Bayley*, J., said: "The court never grant this writ, except for public purposes, and to compel the performance of public duties." *Best*, J., said: "If we were to grant this rule, we should make ourselves auditors, to all the trading corporations in England."

2. But in a later case[2] it was held, that mandamus may be granted, to compel the production and inspection of corporation books and records, at the suit of a corporator, where a distinct controversy has already arisen, and the relator is interested in the question, and the former cases upon the subject are elaborately reviewed, and held to confirm this view.[3]

3. The court has refused to grant a mandamus to a private trading corporation, to permit a transfer of stock to be made, in their books.[4] In a late case (1850) the writ was applied for, to compel a railway company to take the company seal off the register of shareholders.[5] Lord *Campbell*, Ch. J., said: "If I had the smallest doubt, I would follow the example of the high tribunal" (Q. B. in Ireland) "which is said to have complied with a similar application. But having no doubt, I am bound to act on my own view. The writ of mandamus is most beneficial, but *we must keep its operation within legal bounds, and not grant it, at the fancy of all mankind. We grant it, when that has not been done, which a statute orders to be done, but not for the purpose of undoing what has been done." "It is said the court will compel the corporation to affix its seal, when it refuses to do so, without legal excuse, but will not try the legality of an act, professedly done in pursuance of a statute." The difference seems to be one of form, rather than substance, and to rest mainly upon the consideration, that after the act is done, its legality had better be tested, in the ordinary mode, by an action at law, or in equity.

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2 Rex *v.* Merchant Tailors' Company, 2 B. & Ad. 115.

3 Rex *v.* Hostmen of Newcastle-upon-Tyne, 2 Strange, 1223. So to inspect the court roll of a manor, at the instance of a tenant, who has an interest in a pending question, and has been refused permission to inspect the court rolls, by the lord of the manor. Rex *v.* Shelley, 3 T. R. 141. But not otherwise. Rex *v.* Allgood, 7 T. R. 746. But it is not necessary a suit shall be pending, if a distinct question have arisen. R. *v.* Tower, 4 M. & S. 162.

4 Rex *v.* The London Assurance Company, 5 B. & Ald. 899.

5 Nash, *ex parte*, 15 Q. B. R. 92.

4. But the writ has been granted to compel the production of a register of shareholders, to enable a creditor to proceed against them.[6] So too, to compel the registry of the name of the owner of shares, properly transferred, or of the name of the personal representative, in case of the decease of the owner.[7] But in some cases, of peculiar necessity for specific aid by way of mandamus, as the delivery of a key to the party, entitled to hold it, by the foundation of a private charity,[8] the writ has been awarded.

5. And there can be no doubt the Court of King's Bench, has almost immemorially been accustomed to try the validity of municipal and other public corporate elections, by *quo warranto*, which, in case of illegality found, will displace the incumbents, but not establish those, rightfully entitled to the function,[9] mandamus * being requisite for that purpose. But whatever may be the English rule, in regard to merely private corporations, it is certainly settled in this country, that the courts will try the validity of an election, and the question of usurpations, and the legality of amotions, in private corporations,[10] in this mode. But

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6 Reg. *v.* Worcestershire & Stafford. Railway, Q. B. Weekly R. 1853–54, 482.

7 *Ante*, § 42 and § 44; Reg. *v.* L. & C. Railway, 13 Q. B. R. 998. No question is made here but the court will compel the company, by mandamus, to enter a transfer upon their books, in a proper case, but the application was denied on other grounds.

8 Reg. *v.* Abrahams, 4 Q. B. R. 157.

9 Rex *v.* Williams, 1 Bur. 402; Rex *v.* Hertford, 1 Ld. Ray. 426; 1 Sal. 374; Rex *v.* Breton, 4 Burrow, 2260; Rex *v.* Cambridge, 4 Bur. 2008; Rex *v.* Tregony, 8 Mod. 111, 127; Rex *v.* Turkey Co. 2 Burrow, 999; Anonymous, 2 Strange, 696.

In some English cases the King's Bench seems to have altogether disregarded the distinction between public and private corporations, in exercising control over their functionaries. Rex *v.* Bishop of Ely, 2 T. R. 290. And in Rex *v.* St. Catherine's Hall, 4 T. R. 233, the refusal to grant the writ seems to be placed altogether upon other grounds. But it seems a mandamus will not be awarded to compel a voluntary society to recognize the rights of the minority. The King *v.* Gray's Inn, Douglass, R. 353; Rex *v.* Lincoln's Inn, 4 B. & C. 855. Where there is already one in the office *de facto*, mandamus will not be awarded, *quo warranto* being the proper remedy to try the title of the officer in possession. Rex *v.* Mayor of Colchester, 2 T. R. 259, 260. But in Rex *v.* Thatcher it was awarded to the commissioners of land-tax to admit the person clerk, having the majority of legal votes. 1 Dow. & R. 426; The People *v.* The Corporation of New York, 3 Johns. Cases, 79. The St. Louis County Ct. *v.* Sparks, 10 Missouri R. 117; Bonner *v.* State, 7 Georgia R. 473; Clayton *v.* Carey, 4 Maryland R. 26.

10 Commonwealth *v.* Arrison, 15 S. & R. R. 131; People *v.* Thompson, 21

there is one case where the court refused to try the title to an annual office, by writ of mandamus, for the reason that it would prove unavailing.[11] But it has been awarded in England to restore a clerk to a butchers' company, a clerk to a company of masons, and sundry similar officers,[12] and in this country, to restore the trustee of a private academic corporation,[13] a member of a religious corporation and many similar officers.[14]

*SECTION IX.

THIS REMEDY LOST BY ACQUIESCENCE. PROCEEDING MUST BE BONA FIDE.

1. *Remedy must be sought at earliest convenient time.*
2. *Courts will not hear such case, merely to settle the question.*
3. *In New York may be brought any time, within statute of limitations.*

§ 198. 1. The right to interfere in the proceedings of a corporation, by mandamus, is one of so summary a character, that it

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Wendell, R. 235; s. c. 23 Wendell, R. 537; State *v.* Boston, Concord & M. R. 25 Vt. R. 433; In the matter of the White River Bank, 23 Vt. R. 478; Commonwealth *v.* The Union Fire and Marine Insurance Co. 5 Mass. 231; State *v.* Buchanan, Wright, R. 233; State *v.* Ashley, 1 Pike, R. 570; St. Luke's Church *v.* Slack, 7 Cush. R. 226.

[11] Howard *v.* Gage, 6 Mass. R. 462. But this case was decided upon the ground that the statute of Anne not being in force in that state, the truth of the return to the alternative writ could not be tried, till the term would expire. But the decision is scarcely maintainable even upon that ground.

[12] Angell & Ames on Corporations, § 704.

[13] Fuller *v.* The Trustees of the Academic School in Plainfield, 6 Conn. R. 532. The opinion of *Daggett*, J., here discusses the power of amotion of trustees and officers, by eleemosynary corporations, somewhat at length, and comments very judiciously upon the cases upon the subject.

[14] Green *v.* The African Methodist Ep. Society, 1 Serg. & R. 254; Commonwealth *v.* St. Patrick Benevolent Society, 2 Binney, 441, 448; Commonwealth *v.* The Philanthropic Society, 5 Binney, 486; Commonwealth *v.* Penn. Ben. Institution, 2 Serg. & R. 141; Franklin Ben. Association *v.* Commonwealth, 10 Barr. R. 357; Commonwealth *v.* The German Society, 15 Penn. St. R. 251. But if the society have the absolute power of expulsion, it would seem their judgment in the matter is not revisable. s. c.

But it was said a private person who makes a highway upon his own land, and dedicates it to public use, had no such interest in the highway, as to enable him to sue for penalties given against a railway which had cut through the highway and not restored it, and a mandamus to enforce the recovery of such penalty was

should be asserted, at the earliest convenient time, or it will not be sustained.[1] And especially where, in the mean time, the facilities for accomplishing a public work, or the public demand for it, have materially changed, the writ will not be awarded.[2] But it is often proper and necessary to wait till public works are completed, before moving for the writ.[3]

2. The English courts decline to hear applications for mandamus, which are not *bonâ fide*, but merely to obtain the opinion of the court,[4] even where the prosecutor may have *bonâ fide* purchased shares in the corporation, but for the mere purpose of trying a question, in which the public have an interest.[4]

3. In New York it was held, that, as there was no special limitation upon this remedy, it might be brought within the time fixed for the limitation of other similar or analogous remedies.[5] But this rule seems liable to objection, in many cases. The English rule, that the party should suffer no unreasonable delay, in the opinion, and discretion of the court, seems more just and equitable, and is countenanced by other American cases.[6] The late decisions of the English courts are very strict upon this point.[7]

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denied, on the ground that the prosecutor had no public duty, in regard to the highway. Reg. *v.* Wilson, 11 Eng. L. & Eq. R. 403.

[1] Rex *v.* Stainforth & Keadby Canal Co. 1 M. & S. 32; Rex *v.* The Commissioners of C. Inclosure, 1 B. & Ad. 378; Reg. *v.* Leeds & Liverpool Canal Co. 11 Ad. & Ell. 316; Lee *v.* Milner, 1 Railw. C. 634, Appendix; Reg. *v.* London & N. W. Railway, 6 Railw. C. 634, and Reg. *v.* Lancashire & Yorkshire Railway, id. 654.

[2] Reg. *v.* Rochdale & Halifax T. Railway, 12 Q. B. R. 448.

[3] Parkes, *ex parte*, 9 Dowl. P. C. 614; *post*, Appendix B, § 88; Reg. *v.* Bingham, 4 Q. B. R. 877; 3 Railw. C. 390.

[4] Reg. *v.* Liverpool, M. & N. Railway, 21 L. J., Q. B. 284; 16 Jur. 149; 11 Eng. L. & Eq. R. 408; Reg. *v.* Blackwall Railway, 9 Dowl. P. Cas. 558.

[5] The People *v.* The Supervisors of West Chester, 12 Barb. R. 446.

[6] Mayor, &c. of Savannah *v.* State, 4 Ga. R. 26.

[7] Reg. *v.* Townsend, 28 Law Times, 100, (Nov. 1856.)

*SECTION X.

MANDAMUS ALLOWED WHERE INDICTMENT LIES.

1. *Party may have mandamus sometimes where act is indictable.*
2. *Allowed to compel company not to take up their rails.*
3. *Will not lie, where there is other adequate remedy.*

§ 199. 1. It seems to have been considered that the fact, that a railway or other corporation, had exposed themselves to indictment, by the very act, or omission, proposed to be remedied, by mandamus, was no sufficient answer to the application.[1] But we are not to understand by this, that the two remedies are regarded, as in any just sense concurrent, and at the election of the party injured. An indictment is ordinarily, no adequate redress for private wrongs. The case of a nuisance put by Lord *Denman*, in the last case, illustrates the subject fairly. The indictment only redresses the public wrong inflicted by a nuisance. One who suffers special damage is entitled to a private action, and sometimes to specific redress, in equity, or by mandamus.

2. Hence, where a railway company, after having completed their road, under an act of parliament, by which it was provided, the public should have the beneficial enjoyment of the same, proceeded to take up the railway, a mandamus was awarded to compel them to reinstate it.[2]

3. And it may safely be affirmed, that the mandamus will be denied, where there is other adequate remedy.[3]

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1 Reg. *v.* Bristol Dock Co. 2 Railw. C. 599; Reg. *v.* Manchester & Leeds Railway, 3 Q. B. R. 528.

2 Rex *v.* The Severn & Wye Railway, 2 B. & Ald. 646. *Abbott*, Ch. J., said, in giving judgment: "If an indictment had been a remedy equally convenient, beneficial, and effectual, as a mandamus, I should have been of opinion, that we ought not to grant the mandamus;" but it is not, "for a corporation cannot be compelled by indictment, to reinstate the road."

"The court may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress; but the corporation may submit to the payment of the fine, and refuse to reinstate the road." Grant on Corp. 270.

3 Reg. *v.* Gamble & Bird, 11 Ad. & Ell. 69; Reg. *v.* Victoria Park Co. 1 Q. B. R. 288.

*SECTION XI.

JUDGMENT UPON PETITION FOR MANDAMUS REVISABLE IN ERROR.

§ 200. In those states, where the court, having jurisdiction to award the writ of mandamus, is not the court of last resort, the judgment upon applications for such writs is revisable upon writ of error.[1] But it is said not to be the province of a court of error to issue the writ of mandamus, unless the power is conferred by statute.[2]

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*CHAPTER XXVI.

WRIT OF CERTIORARI.

SECTION I.

TO REMOVE PROCEEDINGS AGAINST RAILWAYS.

1. *Lies to bring up unfinished proceedings, or those not according to the common law.*
2. *This writ is one of very extensive application, unless controlled by statute.*
3. *Where the case is fully heard on the application, judgment may be entered.*

§ 201. 1. WHERE the proceedings against a railway are in a court of record, and according to the course of the common law, after final judgment, the writ of error is the appropriate process, for their revision, in a superior court, and the writ of *certiorari* will not lie.[1] But the *certiorari* is the proper process to bring up an unfinished proceeding, in an inferior court of record, or a

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[1] Reg. *v.* The Manchester & Leeds Railway, 3 Q. B. R. 528, reversing the judgment of K. B. in s. c. 1 Railw. C. 523, this last hearing being in the Exchequer Chamber. 6 & 7 Vict. ch. 67, § 2, gives the right to a writ of error. But upon general principles, it is as much revisable as judgment upon *habeas corpus*. Holmes, *ex parte*, 14 Pet. S. C. U. S. R. 540. See also Columbia Ins. Co. *v.* Wheelwright, 7 Wheat. R. 534.

[2] Angell & Ames on Corp. § 697.

[1] The King *v.* Inhabitants of Pennegoes, 1 Barn. & Cresswell, 142; s. c. 2 Dow. & R. 209; Queen *v.* Dixon, 3 Salk. 78.

summary proceeding, in such court, not according to the course of the common law, after judgment thereon, and where there is alleged error in the proceedings.[1]

2. This writ is of universal application, unless taken away by the express words of the statute, or where the superior court is not the proper tribunal, to proceed with the cause. And in such case, the cause may be brought up, and any error corrected, and then remanded to the inferior court, with a writ of mandamus, in the nature of a *procedendo;* or the mandamus may be awarded, in the first instance, directing the inferior court to proceed and finish the case upon its merits.[2]

*3. Where the case is fully heard, in regard to its merits, upon the rule to show cause, and there is no dispute about the facts, it is common for the Court of King's Bench to give judgment, without waiting for the record to be brought up on *certiorari*,[3] similar to the course we have intimated, in regard to applications for mandamus.[4]

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[2] Woodstock *v.* Gallup, 28 Vt. R. 587; Reg. *v.* Bristol & Exeter Railway, 11 Ad. & Ellis, 202; Crosse *v.* Smith, 3 Salk. 79. It is here said: "There is no jurisdiction which can withstand a *certiorari*. But if the *certiorari* be taken away, by the express words of the statute, the court will not indirectly accomplish the same thing, by mandamus. Rex *v.* Justices of W. R. of York, in the Matter of Railway, 1 Ad. & E. 563; Rex *v.* Fell, 1 B. & Ad. 380; Rex *v.* Saunders, 5 Dow. & R. 611. Where the *certiorari* upon a given subject is taken away, by act of parliament, it must be understood as extending only to the terms of the act, and for something done in pursuance of it. *Denman*, Ch. J., Reg. *v.* Sheffield, A. & M. Railway, 1 Railw. C. 537, 545. *Patteson*, J., "Where there is a total want of jurisdiction and parties have proceeded in defiance of *certiorari*, it is not taken away." South Wales Railway Co. *v.* Richards, 6 Railw. C. 197.

See Jubb *v.* Hull Dock Co. 9 Q. B. R. 443. *Denman*, Ch. J., intimates, that where the *certiorari* is taken away, in regard to proceedings under an act of parliament, that will not deprive the party of that remedy, when the proceeding is complained of, as not coming within the act, although some part of the proceedings are confessedly within the act, citing Rex *v.* The Justices of Kent, 10 B. & C. 477. The right to have proceedings reversed in the Supreme Court, does not deprive the party of the right to bring *certiorari*. Vanwickle *v.* C. & A. Railway; Bennett *v.* Same, 2 Green, 145, 162.

[3] *In re* Edmundson, 24 Eng. L. & Eq. 169. This was a case, where the statute required, the complaint to be made within six months, after the cause of action arose, and for non-compliance with this requirement, the court held the proceedings liable to be quashed, and granted the *certiorari*.

[4] *Ante*, § 190.

SECTION II.

WHERE THERE IS AN EXCESS OF JURISDICTION.

§ 202. Where there is an excess of jurisdiction, the appropriate remedy ordinarily is, by action of trespass. And in such cases the court have more commonly refused to give redress, either by *certiorari* or mandamus.[1] But it is not considered that a statutory provision, taking away the writ of *certiorari*, for any thing done under the act of incorporation, or the general statutes, as to railways, applies to things done, wholly without the jurisdiction conferred.[2]

*SECTION III.

JURISDICTION AND MODE OF PROCEDURE.

1. *Lies in cases of irregularity, unless taken away by statute.*
2. *Inquisitions before officers, not known in the law.*
3. *Granting the writ is matter of discretion. Defects not amendable.*

§ 203. 1. Although it is held that a statutory provision, denying the *certiorari*, is to be limited to matters within the jurisdiction conferred, and will not restrict the power of the court, in regard to matters wholly beyond the jurisdiction, the same rule cannot be extended to mere irregularity, in the exercise of the jurisdiction. For unless the prohibition of the writ could apply to such cases, it could have no application, and it is incumbent upon the court to give it a reasonable operation, and construction.[1]

2. An inquisition, taken before two under-sheriffs extraordinary, will be set aside, on that ground.[2] But an inquisition,

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[1] Reg. *v.* Bristol & Exeter Railway, 2 Railw. C. 99; 11 Ad. & Ellis, 202; Reg. *v.* Sheffield & Ashton-under-Lyne & Manchester Railway, 1 Railw. C. 537, 545.

[2] *Ante*, § 201; Reg. *v.* Sheffield, A. & M. Railway, 1 Railw. C. 545; South Wales Railway *v.* Richards, 6 Railw. C. 197; Reg. *v.* Lancashire & Preston Railway, 6 Q. B. 759; 3 Railw. C. 725.

[1] Reg. *v.* Sheffield, A. & M. Railway, 1 Railw. C. 537; 11 Ad. & E. 194.

[2] Denny *v.* Trapnell, 2 Wilson, R. 379. This decision is upon the ground that the sheriff can only appoint one under-sheriff extraordinary.

taken before a clerk of the undersheriff, and an assessor, appointed *pro hac vice* by the sheriff, although none of the persons named in the act, for such an office, will not be quashed on *certiorari*.[3]

3. The granting of the *certiorari* is matter of discretion, although there are fatal defects, on the face of the proceedings, which it is sought to bring up.[4] The affidavits should swear positively and specifically, to the existence of the defects, relied upon.[4] And where the party, applying for the writ, fails, from incompleteness, in the affidavits, he will not have a *certiorari* granted him, upon fresh affidavits, supplying the defects.[4] The conduct of the prosecutor, especially if it had a tendency to induce the defects complained of, is important to be considered, in determining the question of discretion, in regard to issuing the writ.[5]

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*CHAPTER XXVII.

INFORMATIONS IN THE NATURE OF QUO WARRANTO.

1. *General nature of the remedy.*
2. *Its exercise confined to the highest court of ordinary civil jurisdiction.*
3. *In the English practice, this remedy not extended to private corporations.*
4. *In this country it has been extended to such corporations.*
5. *This remedy will only remove an usurper, but not restore the one, rightfully entitled.*

§ 204. 1. This is a subject of very extensive application to corporations, for the purpose of determining, when they have forfeited their corporate franchises, or usurped those, not rightfully belonging to them, and for numerous other purposes. It will be found treated very much at length, in treatises upon corpora-

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[3] Reg. *v.* Sheffield, A. & M. Railway, 11 Ad. & Ellis, 194. Thus showing the disposition of the court, to sustain the proceedings, when not in contravention of the express terms of the statute.

[4] Reg. *v.* Manchester & Leeds Railway, 8 Ad. & Ellis, 413. Lord *Denman* says, "I disclaim the principle, that we are to issue a *certiorari*, to bring up the inquisition, on the ground that there may probably be defects; we must clearly see that facts do exist, which will bring the defects before us."

[5] Reg. *v.* South Holland Drainage, 8 Ad. & E. 429.

tions.[1] We should scarcely feel justified, in going into the subject further here, than it has a special application to railways. The form of the proceedings, in modern times, is by information of the attorney general, or other public prosecuting officer, on behalf of the state, or sovereignty, in the nature of a *quo warranto*, upon which a rule issues to the defendant to show, by what warrant, he exercises the function, or franchise called in question. These proceedings are now very much controlled, in England, and in the American states, by statute, defining the form of process, and the jurisdiction of the courts, in regard to them.

2. In the absence of special provisions, the highest courts of ordinary civil jurisdiction are accustomed to exercise the prerogative right of sovereignty, to issue this process, as well as other prerogative writs, such as mandamus, certiorari, procedendo, prohibition, &c. In some of the states the courts refuse to exercise any such prerogative rights.[2] And in others this power is, by statute, conferred upon the Court of Chancery; but in other forms.[3]

3. The English courts do not seem to have allowed the exercise of this proceeding, in the case of mere private corporations, *although there are numerous cases, in the English books, of the exercise of this proceeding, in regard to municipal corporations,[4] and others, of an important public character.

4. But there is no question, that in the American states, this

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1 Angell & Ames on Corporations, § 731–765. The information may set forth specifically the ground of forfeiture relied upon, or may call upon the corporation to show by what warrant they still claim to exercise their corporate franchises; and the information, like any other criminal information, is regarded, as amendable. Commonwealth *v.* Commercial Bank, 28 Penn. St. R. 383.

2 State *v.* Ashley, 1 Pike (Ark.) R. 279; State *v.* Turk, Mart. & Yerg. 287; Attorney-General *v.* Leaf, 9 Humph. 753. See also State *v.* Merry, 3 Missouri R. 278; State *v.* McBride, 4 id. 303; State *v.* St. Louis P. M. & Life Ins. Co. 8 id. 330, where the latter state held the writ should issue.

3 State *v.* Turk, Mart. & Yerg. R. 287; State *v.* Merchants' Ins. Co. 8 Humph. R. 253; Attorney-General *v.* Leaf, 9 id. 753.

4 Rex *v.* Williams, 1 Bur. R. 402; Rex *v.* Breton, 4 Burrow, R. 2260; Rex *v.* Highmore, 5 Barn. & Ald. 771; Rex *v.* M'Kay, 4 B. & C. 351. The same rule obtains in regard to this proceeding, in this respect, in England, as to mandamus. *Ante*, § 193; Rex *v.* Sir Wm. Lowther, 1 Strange, 637; Rex *v.* Mousley, 8 Ad. & Ellis, N. S. 957, decided in 1846, where it is held that the mastership of a hospital or a grammar-school, was not of so public a character, as to justify the exercise of this remedy.

form of proceeding is extended to aggregate corporations in general, and more especially to the case of banks and railways, which partake, in some sense, of a public character.[5] The general principles, which we have found applicable, to the subject of mandamus, will, for the most part, apply to this proceeding.[6]

5. The court cannot establish corporate officers, who would have been elected, had all the legal votes offered been received by the inspectors.[7] The only remedy is to set aside the election.

And where a railway company are authorized to make a line, with branches, and they completed a portion of it, but abandoned other parts of it, this is not a public mischief, which will entitle the attorney-general to file an information, in the nature of a *quo warranto*, against the company, to prevent them from opening the part completed, until the whole is perfect.[8]

And an information in the nature of a *quo warranto*, under the Massachusetts statute, will not lie against a railway company, in behalf of a stockholder, merely because they issued stock below the par value; and began to construct their road, before the requisite amount of stock was subscribed, it not appearing that the petitioner's private right was thereby put at hazard.[9]

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[5] Commonwealth *v.* Arrison, 15 Serg. & Rawle, 128; The People *v.* Thompson, 21 Wend. R. 235; s. c. 23 ib. 537; Common *v.* Union Ins. Co. 5 Mass. R. 231. See *ante*, § 197; State *v.* B. Concord & M. Railway, 25 Vt. R. 433; Grand Gulf Railway and Bank *v.* State, 10 Sm. & M. 427; State *v.* A. P. Hunton and others, 28 Vt. R. 594.

[6] Chap. xxv.

[7] In the Matter of the Long Island Railway, 19 Wendell, 37; 2 Am. Railw. C. 453.

[8] Attorney-General *v.* Birmingham Junction Railway, 8 Eng. L. & Eq. R. 243.

[9] Hastings *v.* Amherst & Belchertown Railway, 9 Cush. R. 596. In this case the charter provided that the road extend "through Amherst." Another section of the charter provided that the road might be divided into two sections, one extending "to the village of Amherst," and the other from "Amherst to Montague." It was held, that taking land for the road, upon a route not terminating "in either village of Amherst," was not the exercise of a franchise, not granted by the charter.

*CHAPTER XXVIII.

EQUITY JURISDICTION IN REGARD TO RAILWAYS.

SECTION I.

INJUNCTIONS AGAINST RAILWAY COMPANIES.

1. *Courts of equity will not assume the control of railway construction.*
2. *Will restrain company from taking lands by indirection.*
3. *Will restrain railway company, when exceeding its powers.*
4. *If company have power to pass highways, board of surveyors cannot stop them.*
5. *Board of surveyors should apply to the tribunals of the country.*
6. *Equity will restrain company, from exceeding powers, or if they have ceased.*
7. *Injunctions to enforce the payment of compensation for land.*
8. *Injunction suspended, on assurance of payment, by short day.*
9. *Course of equity practice must conform to change of circumstances.*
10. *The course of proceeding in American courts of equity is the same.*
n. 11. *Review of the cases upon this subject.*

§ 205. 1. INJUNCTIONS in courts of equity, to restrain railways, from exceeding the powers of their charters, or committing irreparable injury to other persons, natural, or artificial, have been common, for a long time, in England, and in this country.[1] But the courts of equity will not undertake to determine questions of engineering, and take the construction of a railway under their own control, in order to keep them within their powers.[1] A question of engineering is ordinarily referred to a disinterested engineer,[1] and in such case the court bases its order upon the report of such engineer.[1]

2. The courts of equity will enjoin a railway, from taking land ostensibly under their powers, for one purpose, when in fact they desire it for another, not within their powers.[1] In all cases of doubt, in regard to the extent of the powers of the company, the *conclusion should be against its exercise, and the company should go to the legislature, instead of the courts, to have their powers enlarged.[1]

[1] Webb *v.* The Manchester & Leeds Railway, 1 Railw. C. 576; 4 My. & Cr. 116.

3. In an early case,[2] it was held by the vice-chancellor, that the fact that the company were proceeding to take lands, after their powers had expired, was no ground of interfering, by injunction, unless it were shown, that irreparable mischief would otherwise ensue. But the lord chancellor held, in the same case, that where it is clearly shown, that a public company is exceeding its powers, this court cannot refuse to interfere by injunction.

4. It has been held, that in a parish, through which a railway is granted, with the right to traverse the highways of such parish, or alter their levels, by restoring them to their former usefulness,

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[2] River Dun Navigation Co. *v.* North M. Railway, 1 Railw. C. 135. The general ground upon which courts of equity will interfere, by injunction, in the case of railways, to keep them within their charter powers, is very fully stated in this case, by Lord *Cottenham*, chancellor, "I am not at liberty (even if I were in the least disposed, which I am not,) to withhold the jurisdiction of this court as exercised, in the first case in which it was exercised, that of Agar *v.* The Regent's Canal Company, Cooper's R. 77, where Lord *Eldon* proceeds simply on this,—that he exercised the jurisdiction of this court for the purpose of keeping these companies within the powers which the acts give them, and a most wholesome exercise of the jurisdiction it is; because great as the powers necessarily are, to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there was not a jurisdiction continually open, and ready to exercise its power, for the purpose of keeping them within that limit, which the legislature has thought proper to prescribe for the exercise of their powers. On that ground I should never be reluctant to entertain any such application. I think it most essential to the interests of the public, that such jurisdiction should exist, and should be exercised whenever a proper case for it is brought before the court, otherwise the result may be, that, after your house has been pulled down, and a railway substituted in its place, you may have the satisfaction, at a future period, of discovering that the railway company were wrong. It would be a very tardy recompense, and one totally inadequate to the injury of which the party has to complain, and individuals would be made to contend with companies who often have vast sums of money at their disposal, and that too, not the money of the persons who are contending. It is a most material point to consider, when you enter into a contest with an individual, whether he is spending his own money, or money over which he has a control, or in which he has comparatively a small interest. If these companies go beyond the powers which the legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, this court is bound to interfere. That was Lord *Eldon's* ground in Agar *v.* The Regent's Canal Company, and I see no reason whatever to depart from the rule there laid down and acted upon; but then of course it must be a case in which the court is very clearly of opinion that the company are exceeding the powers which the act has given them."

or *substituting others, to the acceptance of the board of surveyors of such parish, and if that is not done, the board of surveyors, to cause it to be done, it was not competent for such board, to take the law into their own hands, and put up fences, so as to obstruct the passage of engines across the highways, on the ground that their passing endangered the safety of the public.[3]

5. It was considered that the board of surveyors in such case, should have applied to a court of law, to award a mandamus, requiring the railway company, to construct the substituted highways, in the proper mode, or to a court of equity, for an injunction, to effect the same object.[3] In such case, it was held, that the right of the surveyors was a private right, and that they were in no way interested in the question of public safety.[3]

6. Injunctions have been granted against companies proceeding to take land, contrary to the provisions of their charter,[4] or where their powers had expired.[4] But where the company had rightfully purchased a lease of the land, and were rightfully in possession, a court of equity will not restrain them from proceeding to take the fee, upon the ground, that they have no such power under their charter, as such proceeding would, upon the assumption, convey no title to the company, and there would be no necessity, or propriety, in withdrawing the determination of the mere question of title from the courts of law, whenever it shall arise.[5]

7. But where the company had taken possession of lands, and begun their works, before paying, or depositing the stipulated price, according to the requirements of their charter, it was held proper to restrain them, by injunction, and also to dissolve the injunction, upon payment of the price, into the Court of Chancery, where the land-owner had chosen to come for redress, although the company's act required the deposit in the Bank of England, where the title was disputed, as in the present case.[6]

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[3] The London & Br. Railway *v.* Blake, 2 Railw. C. 322.

[4] Stone *v.* The Commercial Railway, 4 My. & Cr. 122; River Dun Nav. Co. *v.* North Midland Railway, 1 Railw. C. 135.

[5] Mouchet *v.* The Great Western Railway, 1 Railw. C. 567. See *post*, Appendix B. § 97.

[6] Hyde *v.* The Great Western Railway, 1 Railw. C. 277. And in such case it is not necessary, in a bill for specific performance of a contract of sale of the land to the railway company, to make others having an interest in the land, as

8. In a case where the Court of Chancery considered, that the company had taken possession of land, without paying the price, *according to the true construction of the contract between them and the owner, they held the party entitled to redress by way of injunction. But upon the company stipulating to pay the price, by a short day, the injunction was suspended, to give them opportunity to do so, the company undertaking, that if this is not done, the court shall regard the injunction, as of the day of the arrangement.[7]

9. The rule laid down by Lord Chancellor *Cottenham*, and repeated in several cases, that it is the duty of the courts of equity, (and the same is true of all courts, and of all institutions,) to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases, which from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules, established under very different circumstances, decline to administer justice, and to enforce rights, for which there is no other remedy," is certainly worthy of the ablest, the wisest, and best judges, who ever administered the chancery law, of England, or America.[8]

10. That similar rules of practice prevail in the American courts of equity will appear from an examination of the cases upon this subject. It was held the court will not interfere by injunction unless the danger is imminent and the damage irremediable.[9] But the cases where courts of equity have interfered, to prevent threatened mischief[10] and injury, without reparation,[11]

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tenants for instance, parties to the bill. Robertson *v.* The Same, 1 Railway C. 459.

[7] Jones *v.* Great Western Railway, 1 Railw. C. 684.

[8] Taylor *v.* Salmon, 4 My. & Cr. 141; Mare *v.* Malachy, 1 My. & Cr. 559; Walworth *v.* Holt, 4 My. & Cr. 619–635.

[9] Spooner *v.* McConnel, 1 McLean C. C. R. 338; Mayor of Rochester *v.* Curtis, 1 Clarke, 336. See also Jerome *v.* Ross, 7 Johns. Ch. 315.

[10] McArthur *v.* Kelly, 5 Ohio, 139.

[11] Bonaparte *v.* Camden & Amboy Railway, 1 Baldwin, 221; Gardner *v.* Newburg, 2 Johns. Ch. R. 162; Stevens *v.* Buckman, 1 Johns. Ch. R. 318; Amelung *v.* Seekamp, 9 Gill & J. 468; Ross *v.* Paige, 6 Ohio, 166; Browning *v.* Camden & Woodbury Railw. 3 Green, 47; Jarden *v.* Phil. Wilm. & Balt. R. 3 Wharton, 502; Chapman *v.* Mad River & Lake Erie Railway, 6 Ohio State R. 119.

Courts of Chancery have jurisdiction to proceed, by injunction, where public

are very numerous in the American Reports of Chancery decisions.

*SECTION II.

INJUNCTIONS TO PROTECT THE RIGHTS OF LAND-OWNERS, AND OF THE COMPANY.

1. *Company restrained from taking less land than specified in notice.*
2. *Sometimes injunction refused, where great loss will ensue.*
3. *Will not enjoin company, to try constitutionality of their act.*
4. *May be restrained from carrying passengers beyond their limits.*
5. *So also from taking land beyond the reasonable range of deviation.*
6. *But not where the company have the right to take the land.*

§ 206. 1. In accordance with the opinion of the Lord Chancellor, in the note (2) to the last section, it has been held, that

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officers, under a claim of right, are proceeding illegally, and improperly, to injure, or destroy the real property of an individual, or corporation, or where it is necessary to prevent a multiplicity of suits, although the defendants may be sued at law.

As where the commissioners of highways, on the petition of the defendant, had laid out and recorded a private road or way, from a lot of defendant, across the ropes and fixtures of the inclined plan of a railway, which was used for the drawing up, or letting down cars, for the conveyance of merchandise, or passengers. Mohawk & Hudson Railway *v.* Artcher, 6 Paige, 83. See also Belknapp *v.* Belknapp, 2 Johns. Ch. 463; Livingston *v.* Livingston, 6 id. 497.

The courts of equity will interfere, by injunction, in cases of nuisance often, and where the right is clear, and the wrong manifest, will do it without waiting the result of a trial at law. But where the thing complained of is not in itself a nuisance, but only capable of becoming such, by relation, the courts of equity will not ordinarily interfere, in that mode, until the matter has been tried at law. But where the magnitude of the threatened injury bears no just proportion to the probability of it being justifiable, the court will not refuse its aid presently. Mohawk Bridge C. *v.* Utica & Schen. R. 6 Paige, 554; Bell *v.* O. & Penn. Railway, 25 Penn. R. 160. So also where a railway is being constructed so near a canal, having a prior grant, as to seriously endanger the works of the latter, this being first settled by an issue at law. Hudson & Delaware Canal Co. *v.* New York & Erie Railway, 9 Paige, 323; *In re* Long Island Railway, 3 Ed. Ch. R. 487.

In Sandford *v.* The Railway Co. 24 Penn. R. 378, it is said: "If railway corporations go beyond the powers, which the legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, the court is bound to interpose by bill, injunction, or otherwise, as the case may require." s. p. River Dun Navigation Co. *v.* North Midland Railway, 1 Railway C. 135; Agar *v.* Regent's Canal Co. Cooper, R. 77.

where the *company gave notice to take a certain quantity of land, and subsequently proceeded to summon a jury to estimate

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In Tucker *v.* Cheshire Railway, 1 Foster, R. 29; s. c. 1 Am. Railw. C. 196, it was considered material to the inquiry, whether the defendants' bridge so interfered with a former toll-bridge across the Connecticut River, as to justify an injunction, that railway communication was not in use, at the date of the plaintiff's grant, and that it could not therefore have been in the contemplation of the legislature to exclude it, and that a railway bridge did not subserve the same purpose for which the toll-bridge was erected.

And in Newburyport Turnpike Co. *v.* Eastern Railway, 23 Pick. 326, it was held, that a statute, giving railways the power to raise or lower any turnpike, or way, for the purpose of having their railroad pass over or under the same, will justify a railway in raising a turnpike-road to enable them to pass it upon a level, and an injunction was denied.

And where the charter gave the company the right to construct lateral routes, it was held that a shareholder could not restrain the company, from the exercise of such powers, as were conferred by the charter, and in the manner therein specified, on the ground that it will diminish his dividends, or impair the resources of the company. And that where the charter fixes no limit of time for the exercise of such powers, the court will not ordinarily prescribe one. But such grants must be express, and will not be implied. Newhall *v.* Chicago and Galena Railway, 14 Illinois R. 273.

In Morgan *v.* New York & Albany Railway, 10 Paige, 290, it was held, that an injunction, which is to deprive the officers of a corporation, of the control of all its property will not be allowed *ex parte*.

In cases of great injury and where irremediable mischief will be likely to ensue, injunctions are commonly allowed *ex parte*, and the defendant may move to dissolve before answer. Minturn *v.* Seymour, 4 Johns. Ch. R. 173. See also Poor *v.* Carleton, 3 Sumner, 70; New York Printing & Dyeing Establishment *v.* Fitch, 1 Paige, 97.

But in cases of importance, involving no pressing peril, an *ex parte* injunction should not be granted. Accordingly one was denied, to restrain defendant from running a steamboat, and landing passengers, at the plaintiff's dock. N. Y. Print. & Dye. Est. *v.* Fitch, *supra*. So also to take from the directors of a bank the control of its business, on the ground that their election was obtained by fraud. Ogden *v.* Kip, 6 Johns. Ch. R. 160. See also Stewart *v.* Little Miami Railw. 14 Ohio, 353; Ramsdall *v.* Craighill, 9 Ohio, 197; Walker *v.* Mad River Railway, 8 Ohio, 38.

But where, by special act, a railway was required to pass through a certain street, thereafter to be laid, on certain conditions, and not in any parallel street, the Court of Chancery enjoined the company from entering upon private land, for the purpose of locating their road, until the street prescribed in the act, should be opened. Jarden *v.* Phil. Wil. & Balt. Railway, 3 Wharton, 502. So also from condemning any land, which, by their charter, they have no power to take. Moorhead *v.* Little Miami Railway, 17 Ohio, 340.

But where the defendant had addressed letters to the plaintiff, stating the terms

a less quantity, that they should be restrained from proceeding, by injunction, at *the suit of the land-owner, the notice to treat constituting the relation of vendor and purchaser between the company and land-owner, as to all the land included in the notice.[1]

2. In one case Lord *Cottenham*, Chancellor, declined interfering on behalf of a land-owner, although the possession of the land had been obtained from a tenant of the plaintiff, by the company, by means of circumvention and fraud. The ground of the refusal seems to have been, that the road having been already built, the effect of the injunction prayed for, would be, to turn the defendants out of the use of it, and virtually put it into the plaintiff's control. The Lord Chancellor says: "The case originally may have been a case of waste—waste occasioned by the cutting of the tram-road, and the laying of the iron rails over the plaintiff's land, but what is now claimed by the defendants is simply a right of way; and if they are not entitled to that right, they are mere trespassers, and the plaintiffs have their proper legal remedy against them as such."[2]

3. But where a land-owner threatened forcible resistance to the progress of the railway, the Court of Chancery declined to

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upon which he would allow them to carry their railway over his land, and the company commenced their operations upon the land, in conformity with the propositions, and with the knowledge of defendant, it was held that plaintiffs had thereby accepted the defendant's proposition, and were bound by its terms, and that the same was consequently binding upon defendant, citing Mactier *v.* Frith, 6 Wend. 103, 119. The plaintiffs having substantially performed the contract, and the defendant having shut up the road, after it had been used several months, a perpetual injunction was granted, against defendant obstructing the road, but without prejudice to any claim he might have against the plaintiffs. New York & New Haven Railway *v.* Pixley, 19 Barb. 428.

[1] Stone *v.* The Commercial Railway, 1 Railw. C. 375; s. c. 4 Mylne & C. 122. But in Mouchett *v.* The Great W. Railway, 1 Railw. C. 567, the vice-chancellor declined to restrain the company from assessing the value of the fee-simple in land, upon the alleged ground, that they were not authorized to take such estate, as in that case the proceedings will be merely void, and it is not claimed the company are not entitled to the present use and occupancy of the land, or that they are so using it, as to cause irreparable injury to the inheritance.

[2] Deere *v.* Guest, 1 My. & Cr. 516. But see Warburton *v.* The London & Blackwall Railway, 1 Railw. C. 558. The plaintiff should satisfy the court, that he has sustained substantial damage, from the violation of a legal right, to entitle himself to an injunction. Holyoake *v.* Shrewsbury & Birmingham Railway, 5 Railw. C. 421.

interfere.[3] The Court of Chancery declined also to interfere and enjoin a railway company from building their road, at the suit of a land-owner, on the alleged ground of the unconstitutionality of the company's charter. It was held that the case must take the ordinary course of judicial proceedings, and for all preliminary purposes, and until the hearing upon the merits, the constitutionality of the company's act would be assumed.[4]

*4. But where the charter of a railway company gave them the exclusive right of carrying passengers and freight, from Atlanta to Macon, it was held that the company could not, under this charter, carry from their station in Macon, through the city, to the station of another railway, for the convenience of their customers, and they were enjoined from so doing.[5]

5. And it was held, that a railway had no right to take land for a warehouse, four hundred yards from their track, and build a track to such point, although the land requisite, for both purposes, did not exceed five acres, and the company were perpetually enjoined.[6]

6. But a court of equity will not enjoin a railway company from constructing their road across the plaintiff's land, when the charter provides a mode for the land-owner to obtain an appraisal of compensation, and he has not resorted to it.[7]

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3 Montgomery & West Point Railway *v.* Walton, 14 Ala. R. 207.

4 Deering *v.* York & Cumberland Railway, 31 Me. 172. But the courts of equity will enjoin the company from taking lands for warehouses and other erections, which are not authorized by their charter. Bird *v.* W. & M. Railway, 8 Rich. Eq. R. 46.

5 Mayor of Macon *v.* Macon & Western Railway, 7 Ga. R. 221.

6 Bird *v.* W. & M. Railway, 8 Rich Eq. R. 46. It was held in this case, that when the court entertain jurisdiction, for the purpose of enjoining the company from the further use of land, they may grant compensation for the injury already committed, by reference to a master, or directing an issue *quantum damnificatus*.

7 New Albany & Salem Railway *v.* Connelly, 7 Porter (Ind.) R. 32.

SECTION III.

EQUITABLE INTERFERENCE IN REGARD TO THE WORKS.

1. *No universal rule upon the subject of equitable interference.*
2. *These matters often arranged, by mutual concessions, and an issue at law.*
3. *Cases illustrating the mode of proceeding in courts of equity.*
4. *Where company required to do least possible damage.*

§ 207. 1. In consequence of the discretion, which courts of equity assume to exercise, in regard to decreeing specific performance of contracts and obligations, or restraining the parties from violating the duties, resulting therefrom, there will be likely to be, more or less, apparent inconsistency, in the disposition of different cases. As no intelligible rule can be laid down upon the subject, it will be useful, briefly to refer to the more important decided cases, bearing upon the question.

2. Where a controversy arose, between the land-owner and the company, in regard to the right of the company to occupy a highway, by substituting another, in a different direction, and which, it *was claimed, would very materially affect the value of the plaintiff's land, for building purposes, by depriving him of access to the highway, the vice-chancellor held, that it was not a case for the interference of a court of equity, at least, until the company had completed their substituted road. But the Chancellor considered it a case, where the court should interfere, to enable the company to know, at once, whether the proposed road, when properly completed, would meet the requirements of their charter. For this purpose he granted a temporary injunction, against occupying the old road, until the new one shall be completed—the plaintiff undertaking to bring an action against the company—and the company admitting for the purpose of the action, that they have taken the old road, and the plaintiff admitting, that the substituted road is, in effect, completed, in order to try the question, whether, when completed, it will be a proper substitution.[1] The company, in another case, were en-

[1] Kemp *v.* The London and Brighton Railway, 1 Railw. C. 495. In this case, after the proposition of his lordship to send the case to the jury, upon its being suggested, by the counsel for the company, that the form of action would not inform them, what kind of road they were bound to make, his lordship answered,

joined from the use of works, erected on a site prohibited in their charter, but with liberty to use the erection, as before, upon their undertaking to erect no more, and to apply for a rehearing, or to prosecute an appeal to the House of Lords.[2]

3. In a case, where the company were proceeding to arch over a street, in order to erect a station, it was held, that they should be restrained, by injunction, until the question of their right to do so, should be settled in a court of law. And for this purpose an action was directed to be tried, before the Barons of the Exchequer, and their opinion being certified in favor of the right claimed, by the company, "if it was necessary, or reasonably convenient for the *construction of a station, and proper warehouses," the Lord Chancellor held, that the injunction should be dissolved, the fact of the commencement of the works, by the defendants, being sufficient proof of the necessity for, and the convenience of, such buildings.[3]

So, too, an injunction was continued temporarily against the trustees of a turnpike road, who proposed to remove stone blocks, laid across their road, by a railway company, in order to pass from their railway to a wharf occupied by them, for the convenience of loading and unloading goods, upon railway carriages, the company not proposing to alter the surface of the turnpike road, or to cross it, by means of railway carriages. But upon notice being given to the trustees of the turnpike road, and the matter being discussed, both the Vice-Chancellor, and the Lord Chancellor, regarded the acts of the railway company, as manifestly wrong, inasmuch, as by their act, they had no power to

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"I am not about to direct an action, to try what sort of road the company are to make. The question before me is, whether the proposed road is such as, under the act, entitles them to take the old road." Bell *v.* The Hull and Selby Railway, 1 Railw. C. 616. The injunction was here retained until the rights of the parties should be determined, by an action at law, to be brought for that purpose, and tried under certain admissions.

2 Gordon *v.* Cheltenham & Great W. Union Railway, 2 Railw. C. 800. It was considered in this case, that a party will not be precluded from relief, by acquiescence in what he may be led to consider, a mere temporary violation of his right, where no evidence is given of expense incurred by another party, in faith of such acquiescence. Clarence Railway *v.* Great North of England, Clarence, and H. Railway, 2 Railw. C. 763. See *post*, § 220, and cases cited, *ante*, § 198.

3 Attorney-General *v.* The Eastern Counties and Northern and Eastern Railway Companies, 2 Railw. C. 823.

deal with the turnpike road at all, for the mere purpose of access to their railway, but only to use it, as it was, and if they proposed to cross it, with their railway, they were bound, by the express terms of their act, to do so, by means of a tunnel, or a bridge, and that it was not proper to continue the injunction, during the trial of the question at law.[4]

So, too, where the company were by their act prohibited from erecting any station at a given point, but built a platform and stairs, to enable them to take up and set down passengers, and proposed to build a road for access to such point, they were temporarily enjoined from the use of such erections, which was made final, upon hearing; the vice-chancellor considering that this, when the road was built, was a station; but that this prohibition did not prevent the company from stopping their engines, where they pleased, and that the passengers might then get in, or out, as they best could.[5]

*So where the company were proceeding to build an arch over a mill-race, for the purpose of supporting an embankment, and it appearing, that the mill would suffer damage, if the arch were not built of larger dimensions, an injunction was granted to restrain the company from making, over the mill-race, an arch of less dimensions, than what was requisite, to secure the mill from injury, the company by their act being bound to make compensation to persons, whose property might sustain damage.[6]

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[4] London and Brighton Railway *v.* Cooper, 2 Railw. C. 312. It seems to be the uniform practice, in the English Railway Acts, to require all road and farm-crossings, to be either, by tunnels or bridges, or else to be protected, by gates, under the control of the officers of the company, which are not allowed to be open, while any train is due.

[5] Lord Petre *v.* The Eastern Counties Railway, 3 Railw. C. 367. But in Eton College *v.* Great W. Railway, 1 Railw. C. 200, it is held, that a prohibition from building a station within three miles of Eton College, does not preclude them from taking up and setting down passengers, within that distance, and renting rooms in a public-house for the convenience of such passengers.

[6] Coats *v.* The Clarence Railway, 1 Russell & Mylne, 181. The extent of the requisite arch, in this case, was determined by the report of an engineer, to whom the question was referred by the Lord Chancellor. In Manser *v.* The N. & E. Railway, 2 Railw. C. 380, the Chancellor held, that in a case, where the affidavits on points of engineering are conflicting, the court will seek for professional assistance, of some impartial engineer, to form a decision upon them. Upon the disputed points, the Chancellor says: "I should like to have the affidavit of some eminent engineer."

4. But where the company were, by their act, required to conduct their works, doing as little damage as possible, it was held, by the Lord Chancellor, that nothing but necessity could justify the company, in carrying on their works, in such a manner, or on such a level, as would cause serious damage to the owner of the land.[7] The maxim, *Sic utere tuo ut alienum non lædas*, applies to persons acting under inclosure, and other acts of parliament, of a similar nature.[8]

SECTION IV.

FURTHER INSTANCES OF EQUITABLE INTERFERENCE AS TO WORKS.

1. *In a clear case equity will direct the mode of crossing highways.*
2. *Mandamus the more appropriate remedy in such cases.*
3. *Towns may maintain bill in equity to protect highways.*

§ 208. 1. The subject of the interference of the courts of equity to enforce contracts between the promoters of railways, and the *land-owners along the proposed line, will be considered, in a subsequent chapter.[1] Where a railway company were attempting to carry a turnpike-road over their railway, in a manner inconvenient to the public use of such road, an injunction was granted to restrain them, from doing it, in that mode, the vice-chancellor explaining, in what mode, the thing should be done, or what results were to be effected, to escape from the injunction.[2] But this injunction was granted, without prejudice to any application the company might make to the Board of Trade. But if the case is doubtful, as for instance a claim for

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7 Manser *v.* The Northern & Eastern Counties Railway, 2 Railw. C. 380. Some very sensible remarks fell from the Lord Chancellor, in this case, in regard to the one-sidedness of testimony, upon points of engineering, and the embarrassment attending the trial of cases, depending upon such questions, unless the courts are enabled to command the aid of masters, wise and experienced in regard to such acts, as come in question.

8 Dawson *v.* Paver, 4 Railw. C. 81.

1 *Post*, § 8; Appendix A. See also *post*, § 97; Appendix B, for further statement of grounds of equitable interference.

2 Attorney-General *v.* London and Southw. Railway, 3 De G. & S. 439; Hodges on Railw. 506; 13 Jur. 467.

land damages, the court will not ordinarily interfere, by injunction, but leave the party to pursue his claim at law.[3]

In some cases where the company have given notice of purchase of lands, which, under the English statute, has the effect to create the relation of vendor and purchaser, but omit any after proceedings, the land-owner has been allowed a decree, equivalent to specific performance.[4]

2. But the more usual remedy, in such cases, as we have seen, is by mandamus, and that, although an old jurisdiction, is not taken away by a new remedy. Yet if a new *right* be given, and a special remedy provided, for enforcing it, such remedy must be pursued.[5]

3. And it has been held, that where a railway claim to maintain *their road upon a public highway, the town, within which the highway is situated, may sustain a bill in equity, for the purpose of trying the question of the right of the company, under their charter, to maintain their road in that place.[6]

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[3] South Staffordshire Railway *v.* Hall, 3 Eng. L. & Eq. R. 105. See also The London & N. W. Railway *v.* Smith, 1 Mac. & G. 216, 13 Jur. 417; East & W. I. Docks & Birmingham J. Railway *v.* Gattke, 3 Eng. L. & Eq. R. 59.

[4] Walker *v.* The Eastern Counties Railway, 5 Railw. C. 469. And where the contract contains stipulations, in regard to communications with other lands, and similar accommodations, the arrangement in regard to them will be determined by the master. Saunderson *v.* Cockermouth & W. Railway, 19 Law J., Ch. 503. But it has been held, that where the contract provides that the price of land shall be settled by an arbitrator, it is not such a contract, as a court of equity will ordinarily enforce. Milnes *v.* Gery, 14 Vesey, 400; Adams *v.* London & B. Railway, 19 Law J. Ch. 557, 2 Mac. & Gor. 118. See also on this subject, Morgan *v.* Milman, 13 Eng. L. & Eq. R. 312; S. C. affirmed, 17 Eng. L. & Eq. R. 203. And the party claiming specific performance must not be premature in his application, or have been guilty of unreasonable delay. Bodington *v.* Great W. Railway, 13 Jur. 144; South E. Railway *v.* Knott, 17 Eng. L. & Eq. R. 555.

[5] *Ante*, § 81; Adams *v.* London and Blackwall Railway, 6 Railw. C. 271, 282; Williams *v.* So. Wales Railway, 13 Jur. 443; 3 De G. & S. 354.

[6] Springfield *v.* Conn. River Railway, 4 Cush. 63. In a very recent and well-considered case, Chapman *v.* Mad R. & Lake Erie Railway, and Sandusky City & Indiana Railway, 6 Ohio St. R. 119, where the first company defendants, having received from private parties donations of land, subscriptions of stock, and payments in money, in consideration that, it should locate its road in a particular place, and allow private side tracks and warehouse privileges, in connection therewith, it was held, upon a bill in equity, praying an injunction, that the company will not be allowed to effectuate a change in fact, though not in name, of the line of its road, so as to remove it from such place, by getting up a new company and

SECTION V.

INJUNCTIONS TO CARRY INTO EFFECT ORDERS OF RAILWAY COMMISSIONERS.

1. *Railway companies perform important public functions.*
2. *Courts of equity will enforce order of railway commissioners, without revising.*

§ 209. 1. The office of the former Board of Trade in England, and that of Railway Commissioners, in many of the American states, is the same. And in England, this office of the Board of Trade, is now, or was for a time, performed by a board denominated The Railway Commissioners. The office of such commissioners, both in England, and this country, seems to be, the protection of the public, from abuses of railway companies. The jurisdiction of such commissioners is therefore of necessity confined to such matters, as affect the public, and does not ordinarily extend to such private matters, in the management of railways, as affect the stockholders only, in their pecuniary interests, and relations. This result seems to follow, almost of necessity, from the very nature of the *subject-matter. So far as the public security, and convenience, are concerned, both in regard to the transportation of passengers and freight, and the carrying of parcels, by express, these companies are public functionaries, so to speak, and as such, under the supervision and control of the public police, as much, as other public officers; but in regard to their stock, and the management of their internal pecuniary functions, they are, to all intents, private companies, as much so, as manufacturing, or other mere business corporations.

2. Courts of equity have sometimes lent their aid, to prohibit railway companies from the violation of the orders of the railway

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constructing a new road, parallel with its old one, under a different charter, and permitting its old line to go to decay, without compensating the parties, with whom it had made such contract, for the former location.

And the responsible defendant having leased the line of the other company's road, and suffered its own to fall to decay, so that an injunction restraining them from using the new line, unless they restored the old one, would not relieve the plaintiffs, and it being questionable whether the company had the means of restoring the old line, and the new one being the preferable one, it was held a proper case for a decree compensating the orator in damages.

commissioners, where the public security would be thereby endangered. This was done, in a recent case, where the railway commissioners, having inspected a railway, about to be opened, directed the company to postpone the opening, and the company, notwithstanding, proceeded to open their road for business. The Attorney-General, as *parens patriæ*, applied for an injunction, which was granted, the Master of the Rolls, Sir *J. Romilly*, refusing to inquire into the sufficiency of the reasons, which induced the commissioners to withhold their consent, saying that the company could apply to the Court of Queen's Bench, for a mandamus, to the commissioners, to dissolve the prohibition, if they wished to try that question.[1]

SECTION VI.

EQUITABLE INTERFERENCE WHERE COMPANY HAVE NOT FUNDS.

1. *English courts will not allow company to take land, when their funds fail.*
2. *This has been qualified by later cases, and is very questionable.*
3. *Equity will not interfere where company propose to complete but part of works.*
n. 4. *Cases reviewed, and result stated.*

§ 210. 1. The courts of equity seem, at one time certainly, to have considered the undertaking of the company to build the road, so far the equivalent for the privilege conferred upon them, of taking private property, against the will of the owner, that if it were shown conclusively, that the company never could complete their * undertaking, they would restrain them, by injunction, from taking land, under the powers granted them.[1] But in another case,[2] Lord *Eldon* explains the ground of his former decision thus: "In Agar *v.* The Regent's Canal Company, I acted on the principle that, where persons assume to satisfy the legislature, that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the

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1 5 & 6 Vict. c. 55, § 6; 7 & 8 Vict. c. 85, § 17; Attorney-General *v.* Oxford, Worcester & Wolverhampton Railway, Weekly Report, 1853, p. 330; Hodges on Railways, 671; *post*, § 247.

1 Agar *v.* The Regent's Canal Co. Cooper, 77.

2 The Mayor of King's Lynn *v.* Pemberton, 1 Swanst. 244.

legislature has given the speculators the right to carry the canal, can show that the persons so authorized, are unable to complete their work, and is prompt in his application for relief, grounded on that fact, this court will not permit the further prosecution of the undertaking." This we apprehend would, at the present day, require to be received with considerable allowance.

2. In another case,[3] Lord *Cottenham* thus explains Lord *Eldon's* decision above: "I apprehend that Lord *Eldon* must have gone upon this ground, that where acts of parliament impose certain severe burdens upon individuals, by interfering with their private rights and private property, for the purpose of obtaining some great public good, if the court sees that the undertaking cannot be completed, and that therefore the public cannot derive the benefit, which was to be the equivalent for the sacrifice made, by the public, the court will protect the individual from being compelled to make the sacrifice, under the circumstances, and until it appears, that the public will derive the proposed benefit from it." And even with this qualification, it seems to us, that it would be impossible for a court of equity, to exercise much control over these enterprises, without virtually assuming a supervision over the doings of the legislature, and the business of the country, which would be impracticable, and invidious. It is obvious this purpose has been virtually abandoned in the English courts of equity.[4]

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[3] Salmon *v.* Randall, 3 Mylne & Cr. 439.

[4] Blakemore *v.* The Glamorganshire Canal Navigation, 1 Myl. & K. 154; Gray *v.* The Liverpool & Bury Railway Co. 4 Railw. C. 235. In this last case, the company had, to induce the plaintiff to withdraw opposition, consented to incorporate into their act, a provision, that the line of the railway should not come within a certain distance of a bridge named, without the plaintiff's consent. Upon examination it turned out that plaintiff owned all the land within the line of deviation, from that point, so that the road could not proceed, without the plaintiff's consent. The Master of the Rolls held this could make no difference, even in the construction of the stipulation. The parties must be presumed to have understood the matter, and to have made their contract understandingly, and the court should not defeat it.

See also Lee *v.* Milner, 2 M. & W. 824, and the remarks of *Alderson*, B., limiting the right of a court of equity, to restrain the company from proceeding to take land, to cases where it is evident, they have virtually abandoned the enterprise, and have no longer any serious expectation of accomplishing it, which to us appears the only practicable ground, upon which a court of equity could interfere. Thicknesse *v.* Lancaster Canal Co. 4 M. & W. 472.

* In the case of Gray *v.* The Liverpool & Bury Railway, the Lord Chancellor declined to interfere, until the legal right was determined in a court of law, if either party desired it, the injunction standing in the mean time, to sustain all existing rights.

3. But a court of equity will not interfere, because a railway company do not propose to complete their entire line. The remedy, in such case, if any, being by mandamus.[5] A canal company were restrained by injunction, from converting a canal, for erecting which the company were incorporated, into a railway.[6] But where the directors of a railway company, with the concurrence of the shareholders, on finding the original undertaking impracticable, proceeded to construct a small portion of the works, which were nearly completed, the court declined to interfere by injunction, at the instance of the minority of shareholders, on the ground of their acquiescence, they having known, or had the means of knowing, the progress of the acts complained of.[7]

SECTION VII.

EQUITABLE CONTROL OF THE MANAGEMENT OF RAILWAY COMPANIES.

1. *Courts of equity will not interfere in matters remediable by shareholders.*
2. *Will not restrain company from declaring dividend till works are finished.*
3. *Will interfere to enforce public duty rather than a private one.*
4. *Will restrain such companies from diverting funds to illegal use.*
5. *Interference of court of equity cannot be claimed upon the assumption of the practical dissolution of company.*
* 6. *Directors liable to same extent, as other trustees.*
7. *Managing committee not chargeable with the fraudulent acts of its members.*
8. *Courts of equity will not enforce resolutions of directors, or company.*
9. *Suits in equity in favor of minority against majority.*
10. *Minority may insist upon continuing the business till charter expires.*
11. *Minority may have bill against directors for not resisting illegal tax.*
12. *Company may expend funds in resisting proceedings in parliament.*
13. *Equity will not compel directors to declare dividend, unless they wilfully refuse.*
14. *Directors only liable for good faith and reasonable diligence.*

§ 211. 1. There have been numerous instances of application

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[5] The Attorney-General *v.* The Birmingham & Oxford J. Railway, and other companies, 7 Eng. L. & Eq. R. 283. See Reg. *v.* Eastern Counties Railway, 10 Ad. & Ell. 531; Cohen *v.* Wilkinson, 5 Railw. C. 741.

[6] Maudsley *v.* Manchester Canal Co. Cooper's C. Pr. 510.

[7] Graham *v.* Birkenhead, Lancashire, & Cheshire J. Railway, 2 Mac. & G. 146; 2 Hall & T. 450.

to courts of equity, to interfere in the control of the management of railway companies, in respect of their internal concerns. But as a general rule it is said,[1] whenever the acts complained of are capable of being rectified, by the shareholders themselves, in the exercise of their corporate powers, equity will not interfere, but leave questions of internal management and regulation, to be settled by the shareholders in corporate meeting. And especially is this the case, where the act complained of, is clearly within the power of the company.[2]

2. Hence it was held, that equity had no jurisdiction to restrain a railway company, from declaring a dividend, until their works were all completed, there being no provision in the acts, to that effect.[2]

3. But courts of equity are far more ready, upon a bill properly framed, to interfere to enforce a public duty of a railway company, than a mere private duty.

4. So, too, as we have seen,[3] they very often interfere to restrain companies of this kind, from making use of their funds, for a purpose, wholly aside of the general object of their incorporation, and this will be done, at the suit of shareholders, although a majority may have sanctioned, by their votes, the act complained of.[4]

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1 Hodges on Railways, 67.

2 Brown *v.* Monmouthshire Railway and Canal Co. 4 Eng. L. & Eq. R. 113. But where the charter of a railway company provided, that unless certain portions of the work should be completed, within a specified time, no dividend should be declared by them, until the works were so completed, so far as their ordinary shares were concerned, the company were enjoined from making any dividend contrary to the charter. Allen *v.* Talbot, 30 Law Times, 316, (Feb. 1858.)

3 *Ante*, § 56; Bagshaw *v.* The Eastern Union Railway, 7 Hare, 114. So may one, or more shareholders, file a bill, on behalf of themselves and others, against any officer, who is diverting the funds of the company, from their lawful use. Salomons *v.* Laing, 12 Beavan, 377; 6 Railway C. 152; Edwards *v.* Shrewsbury and Bir. Railway, 2 De Gex & S. 537.

4 In the case of Brown *v.* Monmouthshire Railway, 4 Eng. L. & Eq. R. 113, Lord *Langdale*, M. R., after some rather spicy, but highly pertinent strictures, upon the prominent disposition of these public companies to take advantage of every possible evasion, seemingly to gain time, to the serious damage of their own character, for frankness if not for fairness, upon the general merits of the bill, makes the following very prudent and comprehensive exposition of the general subject: "Having given my best attention to this case, and thinking it of very great importance, and of some difficulty, I am, on the whole, of opinion that

*5. In a case, where the plaintiffs complained, that the directors of the Victoria Park Company, and certain others, proprie-

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this bill cannot be sustained. The jurisdiction of this court has, in several cases, been very usefully applied in preventing or checking the erroneous conduct of corporations created by act of parliament for public purposes; but it is not settled to what extent, or subject to what particular limitations, the jurisdiction ought to be exercised; and unless parliament should think fit to lay down rules for the guidance of the courts, litigation to a considerable extent must, I am afraid, take place. The class of cases in which this court has often been called upon to interfere, are those which arise out of a combination of acts which are in themselves illegal, and considered as breaches of contract with the public,—acts which are breaches of contract, express or implied, with the subscribers to the undertaking, and acts erroneous, or breaches of contract incapable of being rectified by the shareholders themselves in the exercise of their own powers. In almost all cases it is necessary to distinguish two things, which, although they often are, and always ought to be, concurrent, are in themselves distinct, and are very apt to be confounded. There is the duty of the committee, directors, or governing body, to the public, and their duty, to the shareholders, whom they represent. In this case, the duty of the company to the public made it imperative upon them to complete their works in a limited time, and to let the works remain unfinished after the expiration of the time is a violation of their duty to the public, and a violation which, if permitted, would enable the company to do that which this court has repeatedly exercised its jurisdiction and power to prevent. If they are allowed to neglect the completion of their works until after the expiration of the time limited by the act, and are then allowed to make profit of so much as they have done, and to abandon the rest, it would seem that the means might at any time be found to abandon any part of their works at their own pleasure, and thus might extensive fraud be committed upon shareholders who had subscribed for the whole works. Such permitted violation of a duty to the public would show a most unfortunate state of the law, and be, in my opinion, a great injury to the public. But regarding this as a public wrong, or as a violation of duty to the public, it does not appear to me that this court has jurisdiction to interfere. The case does not appear to me to come within the authority of any decided case, or within the principle of the cases in which the court has interfered to prevent application of funds, subscribed for a whole purpose, to the completion of a part of it only; nor can it, I think, be safely said, that in no case whatever ought joint-stock companies to be allowed to divide any profits, or receive any tolls until all their works have been completed. If parliament so enacted, it would probably be much better for the public, and also much better for the companies or shareholders themselves; but it is plain that the affairs of a company might be in such a state, with such probability of being at any time able to raise all the capital required for the completion of their works, that there would be no risk whatever in dividing some interim profits. But so far as the public interest is concerned, I do not think that this court has, on such a bill as this, jurisdiction to interfere. As to the duties which the governing body of such a company owe to their constituents, the shareholders, this court does not attempt

tors of *shares, had entered into speculating purchases of the property of the company, and a majority of the directors being bankrupts, were not competent to exercise such office, and that the defendants were in various modes squandering the property of the company, and praying for the appointment of a receiver, and an injunction to compel the application of the company's resources to the extinguishment of its liabilities, and for the winding up of the affairs of the company, the vice-chancellor held, that upon the facts stated, he must presume the existence of a board of direction *de facto*, and the possibility of convening a general meeting of proprietors, capable of controlling the acts of the existing board, and that there therefore appeared no insuperable impediment, in the way of the company obtaining redress, in its corporate capacity, for the acts complained of, and that therefore the plaintiffs could not sue in a form of pleading, which assumed the practical dissolution of the corporation.[5] In

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to direct the performance of all such duties, but, on the contrary, leaves to the companies themselves the enforcement of all the duties arising out of matters which are the subject of internal arrangement. It seems very improper, and very imprudent, to treat as profit any part of their funds or income, at a time when they are without the pecuniary means of performing the works which they are bound to perform, in discharge of their duty to the public. The committee, with the sanction of the shareholders, are proceeding in a manner which (being attended with a constant breach of public duty) may result in the most serious injury to the shareholders themselves, in the same manner that any bad management injures those whose interests are affected by it; but they do it for themselves, and they must suffer the consequences. I think, therefore, that the demurrer for want of equity must be allowed. It appears to me that this court has not jurisdiction to interfere, on the mere ground that the defendants are acting in violation of their duty to the public, and that the misapplication of the income is a proper subject of internal regulation."

In Henry *v.* Great Northern Railway, 30 Law Times, 10, it is held, that the holders of preference shares, as they are called in England, are entitled to have the company enjoined, from declaring any dividend, in favor of the ordinary shareholders, so long as the company remains liable to a deficit in their funds, caused by an officer of the company having defrauded them by forgeries. This case was affirmed in the Equity Court of Appeal, 30 Law Times, 141. See also Gifford *v.* New Jersey Railw. 2 Stockton's Ch. R. 171.

[5] Foss *v.* Harbottle, 2 Hare, 461; Thames Haven Dock and Railway Co. *v.* Hall, 3 Railw. C. 441. This last is an action for calls, and the question of the existence of the company was attempted to be raised, after the case was set down for trial. It was held too late to raise such questions, and also that the validity of the authority of directors to make calls, as such, could not be raised in this

a later case before the Lord *Chancellor, *Cottenham*, the opinion of Vice-Chancellor *Wigram*, in Foss *v.* Harbottle, is fully confirmed, and it was conceded that it makes no difference, whether the acts complained of, as being transacted, by the usurping board of directors, were absolutely void and illegal, or merely voidable, at the election of the company. The Lord Chancellor said he had called for one case, where a court of equity had assumed to try the validity of the election of corporate officers, *de facto* exercising certain functions, and this at the suit of individual shareholders, where there appeared no impediment to the corporation seeking redress, by mandamus, or any appropriate remedy, and as no such case had been produced, he should assume, that none existed, and he would not be the first to make such a case.[6]

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mode; and that after plea, it will be presumed that the attorney, bringing the suit, was appointed under the seal of the company, and the court refused to allow a plea, raising these points, to be filed, at this late hour. See also Exeter and C. Railway *v.* Buller, 5 Railw. C. 211, where it is said, that if the directors refuse to comply with the vote of a majority of the shareholders, a court of equity will compel them to do so, by injunction. But the allegation that shares were bought up, by interested parties, to change the vote, is nothing which a court of equity will consider. That is what every one may lawfully do, if he do not infringe the terms of the charter. Mozley *v.* Alston, 1 Phil. C. C. 790.

[6] Mozley *v.* Alston, 1 Phillips, 790; Lord *v.* Copper Miners' Co. 2 Phillips, 740; Bailey *v.* Birkenhead, Lancashire, and Ch. J. Railway, 6 Railw. C. 256. In this last case it was held, that acts not set forth in the bill, although declared to be public acts, could not be referred to, in an argument on demurrer. It should be borne in mind, that the distinction attempted to be drawn, from some of the cases, between void acts of the directors and those which are merely voidable, is important chiefly, in determining the discretion of the Chancellor, and is to be viewed in these cases, much as in other cases, where the authority of agents comes in question. Hodges on Railways, 71. And in Hichens *v.* Congreve, 4 Simons, 420, where certain persons agreed for the purchase of certain iron and coal-mines for £10,000, formed a joint-stock company for working them, and stipulated for the sale of the mines to the company for £25,000, the £15,000 to be divided among the projectors and their friends, who acted, as officers of the company, which being acceded to by the company, and the money distributed accordingly, upon a bill brought by *some* of the shareholders, *on behalf of themselves and the others*, against the persons, who had participated in the £15,000, the latter were decreed to refund, what they had received, and one of them having become bankrupt, after he had paid the amount received by him, into court, under an order upon motion, it was considered, that the plaintiffs were entitled to receive that sum, and were not to be put to prove their demand under

6. But it seems to be well established, that the directors of a corporation are liable personally, each for his own share, in any loss occasioned to the company, for malversation, in the exercise of his functions, whether misfeasance, malfeasance, or non-feasance, the same as any other trustee; and redress may ordinarily be obtained in equity.[6] And it seems in such cases, as each director *is liable only, for his own act, and those to which he has assented, and there is no contribution among wrong-doers, there is no necessity, that all the board should be parties to the bill, and although strictly the proceeding should be instituted, in the name of the company, many exceptions are allowed, in this respect, as where the loss falls exclusively, upon a portion of the shareholders, and where the majority are proceeding, in violation of the fundamental law of such companies.[7]

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the commission. Upon the question, who are to receive the benefit of the restitution, the vice-chancellor said, "Those who now are, and those, who, by assignment from the present proprietors, may become members of the company."

Directors to whom the entire management of the company is intrusted, and who receive a remuneration for their services, out of the funds of the company, are under an obligation to the shareholders at large, to use their *best exertions, in all matters, which relate to the affairs of the company.* And without any stipulation to that effect, the duty results, *from the employment*, not to make *any profit* out of the employment, beyond their compensation, and not to acquire any adverse interest, while they remain directors. Benson *v.* Heathorn, 1 Y. & Coll. C. C. 326. See also Robinson *v.* Smith, 3 Paige, 222. So, too, a director is liable to account for premiums received upon the sale of shares. York and N. M. Railway *v.* Hudson, 19 Eng. L. & Eq. R. 361. It was held in this case, that the directors could not discharge themselves from such a claim, by suggesting that the money had been expended for secret purposes, connected with the enterprise, and that persons in a fiduciary relation could not retain any remuneration for their services. But upon this last point, see Hall *v.* Vermont and Mass. Railway, 28 Vt. R. 401. Where the stock of certain shareholders, was about to be sold, and the officers of the company appointed an agent to buy it "for the use of the company," but when purchased they took a portion of it to themselves, it was held they were liable, in an action at law, (in Penn.) to any shareholder, for the damage thereby sustained by him. Kimmel *v.* Stoner, 18 Penn. R. 155; Attorney-General *v.* Wilson, 1 Craig & Phillips, 1. Redress in such cases is to be sought ordinarily it would seem in the name of the corporation. Society of Practical Knowledge *v.* Abbott, 2 Beavan, 559. But very extensive amendments in the frame of the bill, and even in the names of the parties, will be allowed. Jones *v.* Rose, 4 Hare, 52; Fellowes *v.* Deere, 3 Beavan, 353; 7 id. 545; Tooker *v.* Oakley, 10 Paige, 288.

[7] Preston *v.* Grand Collier Dock Co. 2 Railw. C. 335; s. c. 11 Simons, 327;

7. And where the managing committee employed the funds of the company, in buying up the shares, in the market, it was held that the members of the committee were not properly charged with these sums, in winding up the concern.[8] But the vice-chancellor said he entertained no doubt of it being a breach of trust, and that the parties, and all the parties, aiding, or counselling it, when properly brought before the master, might be made liable.[8]

8. But a court of equity will not entertain a bill to compel a railway company to apply funds, raised, by the issue of new stock, according to the resolution by which the new stock was created, by the directors of the company.[9]

9. It is a settled rule of equity law, that the minority of the shareholders, in a joint-stock corporation, may maintain a suit, to restrain the directors of the company, or the majority of the shareholders, from entering into a stipulation, whereby the business of the company is changed, and directed into channels and enterprises, wholly diverse from those originally contemplated, and entered upon, and from which their emoluments had been derived.[10]

10. It is the implied law of the association, that the business shall continue, to the limit of the time fixed by the charter, if it prove remunerative, and "it is the right of a partner to hold his associates, to the specified purposes, while the partnership continues."[10]

11. And where the directors of a bank refused to take the proper measures to resist the collection of a tax, which they themselves believed to have been imposed upon them, in violation of their charter, this refusal amounts to what is termed in law a breach of trust, and a stockholder may maintain a bill in equity

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Wallworth *v.* Holt, 4 My. & Cr. 619. Each shareholder has a distinct interest in dividends declared on stock, which cannot be represented, by other shareholders, suing on behalf of themselves and the rest of the shareholders. Carlisle *v.* Southeastern Railway, 6 Railw. C. 670. See also the opinion of Lord *Cranworth*, V. C., Beeman *v.* Rufford, 6 Eng. L. & Eq. R. 106; Hodges on Railways, 71.

8 London & Birmingham, &c. Railway *in re*, 13 Eng. L. & Eq. R. 201.

9 Yetts *v.* Norfolk Railway, 5 Railw. C. 487; 3 De G. & S. 293; 13 Jur. 249.

10 Kean *v.* Johnson, 1 Stockton (N. J.) Ch. R. 401; *ante*, § 20.

against them, asking for such remedy, as the case might require.[11]

12. And it would seem that the company might expend their funds, to a reasonable amount, in resisting proceedings in parliament, the tendency of which will be to injure the company.[12]

13. But a court of equity will not compel the directors of a corporation to declare dividends, out of the surplus earnings of the company, unless they are shown to have refused, from a wilful abuse of their discretion.[13]

14. The directors are only liable, for good faith, and reasonable diligence.[13]

*SECTION VIII.

APPLICATIONS TO LEGISLATURE FOR ENLARGED POWERS.

1. *Equity will not restrain railway companies from petition for enlarged powers.*
2. *The early English cases favored such applications.*
3. *The proper limitations stated.*

§ 212. 1. In general, perhaps, courts of equity would not feel called upon to restrain the directors and agents of the company, from applying to the legislature, for an alteration, or enlargement of their powers, for this is sometimes indispensable for the accomplishment of the objects of their creation, and very often highly desirable. There are numerous instances in the books,[1] of companies being enjoined from proceeding to certain works, until they did obtain such an enlargement of their powers. But it is not uncommon for a court of equity to restrain the company, from applying their existing funds to such purpose.[2] And where

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[11] Dodge *v.* Woolsey, 18 How. Sup. Ct. Rep. 331.

[12] Bright *v.* North, 2 Phill. 216, before *Cottenham*, Lord Chancellor. This was the case of the conservators of river banks, whose funds are raised by a rate upon the adjacent land-owners, and is stronger, perhaps, than that of a railway company. And the Lord Chancellor seemed to entertain so little doubt of the duty of the commissioners, to expend money in opposing any grant in parliament, which would injure the works, under their care, that he did not call for argument, in favor of the exercise of the right.

[13] Smith *v.* Prattville Man. Co. 29 Ala. R. 503.

[1] Frederick *v.* Coxwell, 3 Y. & J. 514.

[2] Stevens *v.* South Devon Railway, 2 Eng. L. & Eq. R. 138. In this case, and in Parker *v.* Dun Navigation Co. 1 De G. & S. 192, the company entered into a stipulation, that the objectors should be heard before the parliamentary committee,

the new scheme is in conflict with the interests of other railways, who, by leave of the legislature, own shares in the company applying for an extension of their line, or an enlargement of their powers, equity will not restrain them absolutely from procuring the contemplated grant, but only from using their funds for that purpose; and will also prohibit one company from keeping its proceedings secret, as to another company, owning part of their stock, and will generally enjoin the act of a majority of a joint-stock company, where the voice of the minority is not properly heard at the meeting, or is agreed to be disregarded, by previous concert.[3]

2. The early cases, upon this subject, before Lord *Brougham*, as Chancellor, although, in some respects, more liberal, in favor *of allowing applications to parliament, seem to be more in accordance with the spirit of enterprise, in this country, than some of the recent English cases.[4]

3. The most, which upon principle, can be justified, in this direction, is, to restrain the company from applying their existing funds, either to the obtaining of enlarged powers, or to carrying them into effect.

But the question of enlarging the powers of the company, or altering its fundamental law, is a matter resting altogether, in the discretion of the legislature. But this, if accomplished, will not bind the existing shareholders, who have not assented to the alteration, but must be carried into effect, by a new subscription probably, and this will subject the corporation to the embarrassment of a double accountability, or the apportionment of loss and profits, upon the several portions of the enterprise.[4]

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without which, it is said, in the English practice, before such committees, where the application is in the name and behalf of the company, shareholders objecting are not allowed to be heard.

[3] Great Western Railway *v.* Rushout, 10 Eng. L. & Eq. R. 72. See also Const *v.* Harris, 1 Turner & Russell, 496, where Lord *Eldon* goes into an elaborate consideration of the rights of the minority of joint-stock companies, and what acts of the majority are binding upon the company. Attorney-General *v.* Norwich, 9 Eng. L. & Eq. R. 93.

[4] Hare *v.* The Grand Junction Water Works Co. 2 Russ. & Mylne, 470. And see Ward *v.* The Society of Attorneys, 1 Collyer, 370; Munt *v.* The Shrewsbury & Chester Railway, 3 Eng. L. & Eq. R. 144. See Cunliffe *v.* Manchester & Bolton Canal Co. 2 Russ. & Mylne, 480, in note. *Ante*, § 56.

SECTION IX.

SPECIFIC PERFORMANCE.

1. *Courts of equity will often hold control over railway contracts, referring the question of law to the courts of law.*
2. *But where the legal right is clear, equity will not interfere.*
3. *And where the affidavits are conflicting, court declined interfering.*
4. *So, too, where the company agreed to stop at a refreshment station.*
5. *So also, if there is doubt of the legality of the contract, or its character.*
6. *A contract between different companies for the use of each other's track is permanent, and will be enforced in equity.*
7. *Will decree specific performance in regard to farm accommodations.*

§ 213. 1. There can be no doubt courts of equity will, in proper cases, decree specific performance of contracts, between different railways, or between natural persons, and railway companies. But where the legal rights of the parties are doubtful, and no irreparable injury is to be apprehended, an action at law, to try the legal question, was ordered, and the business of the companies concerned was ordered to go on, the injunction of the vice-chancellor being dissolved by the Lord Chancellor for that purpose, and an account of passengers and traffic upon the railway, *in the mean time, ordered to be kept, to enable the Chancellor ultimately to adjust the question of damage, according to the decision of the question at law.[1]

2. But it was said, in another case,[2] by the Lord Chancellor, reversing the decree of the vice-chancellor, that the court cannot, upon an alleged equity, interfere with an admitted legal right, unless there be a manifest certainty that, at the hearing of the cause, the plaintiff will be entitled to relief: That the title to relief in this case was not so clear, as to justify the court in con-

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[1] The Shrewsbury & Birmingham Railway *v.* The London & N. W. Railway & The Shropshire Union Railway, 1 Eng. L. & Eq. R. 122. The question in this case was whether the defendants, according to a certain contract, claimed to exist between the companies, is at liberty to do business, between certain points. It was claimed, among other things, that the contract was wholly void, as against public policy. Furness Railway Company *v.* Smith, 1 De G. & S. 299; *ante*, § 181.

[2] Playfair *v.* Birmingham, Bristol and Thames J. Railway, 1 Railw. C. 640. Courts of equity will not decree specific performance of the contract of directors of a railway company, which is grossly improvident. 29 Law Times, 186.

tinuing the injunction, except upon the terms of the plaintiff giving judgment in the action, and paying the amount sued for into court.

3. And in a case where the time for taking land under the company's act had expired, they having purchased land of A, and of B, and being about to enter upon the land to which they supposed they had purchased the title of B, A, claimed a life-estate in the same, and brought this bill to restrain the company from proceeding to appropriate it. The affidavits being conflicting, the court refused to interfere, by injunction, but left the plaintiff to his remedy at law.[3]

4. So, too, the court refused to grant an injunction requiring the company to stop their train, at a refreshment station, as the plaintiff claimed they had agreed to do, the company undertaking to pay such a sum of money, as may be assessed as damages, for the violation of the covenant, to be ascertained by the court.[4]

*5. But where any doubt arises, in regard to the legality of a contract, or if it be not of a class, where specific performance is usually decreed, the court will not interfere by injunction.[5]

6. A contract between two railways, that each shall run upon the track of a portion of the other's line, is of a permanent character, and cannot be determined, without the consent of both parties, although, in terms, it do not specify "successors," and if

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[3] Webster *v.* The Southeastern Railway, 6 Railw. C. 698.

[4] Rigby *v.* The G. W. Railway, 1 Cooper's Cases, 6; s. c. 4 Railw. C. 491. In this case at law, 4 Railw. C. 190, it was held to be unnecessary to aver, that the trains passing the station, in violation of the covenant, contained passengers desirous of having refreshment, and who gave notice thereof. *Alderson*, B., said: "I think the meaning of the covenant is, that the parties have undertaken to stop the trains, in order to the temptation, so to speak, to the passengers to take refreshment." 14 M. & W. 811. The covenant in this case contained an exception of trains "sent by express, or for special purposes," and this was held not to include what are properly called "express trains." Hodges, 64.

[5] Johnson *v.* Shrewsbury & B. Railway, 19 Eng. L. & Eq. R. 584. This is the case of a railway leasing their line and furniture to plaintiffs, and the bill prayed an injunction against the railway determining the contract, contrary to what they claimed to be its true construction. The court said, that by the working of the line by other parties than the company, the public loses the benefit of the guaranty thereby afforded for care and attention. Such an agreement, would seem to be illegal, as contrary to public policy. But if legal, the plaintiffs had ample remedy at law. Foster *v.* Birmingham & Dudley Railway, Weekly R. 1853, 1854, 378; Hodges, 680.

the line of one of the companies is leased to a third company, a court of equity will restrain the other party, from interfering with the use of the line granted to the third company, or its lessees. A contract for such an easement need not be by deed.[6]

7. Courts of equity will decree specific performance of contracts by a railway company with a land-owner, in regard to farm-crossings, and such like works, upon the lands of the company, in which such party has an interest, so material, that the non-performance cannot be adequately compensated at law.[7]

SECTION X.

INJUNCTIONS RESTRAINING ONE COMPANY FROM INTERFERING WITH EXCLUSIVE FRANCHISES OF ANOTHER.

1. *Equity exercises a preventive jurisdiction in such cases.*
2. *Will not interfere where the legal right is doubtful.*
3. *Unless to prevent irreparable injury, multiplicity of suits, or where legal remedy is inadequate.*
4. *Statement of facts and mode of procedure in such a case.*
5. *Injunction against different lines, so connecting, as to create competing line.*
6. *Many cases take similar view.*
7. *Railway not regarded, as an infringement of the rights of a canal.*
8. *But will be restrained from filling up the canal.*

§ 214. 1. The subject of the exclusive franchises of corporations * will be considered elsewhere. But equity exercises a jurisdiction of a preventive character, by way of injunction, in regard to alleged infringements of such franchises, which is of a very important character. The general grounds of such interference are clearly and fully stated, by *Wigram*, Vice-Chancellor, in the case of Cory *v.* The Yarmouth & Norwich Railway.[1]

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[6] Great Northern Railway *v.* Manchester, Sheffield & L. Railway, 10 Eng. L. & Eq. R. 11.

[7] Storer *v.* Great Western Railway, 3 Railw. C. 106; *ante*, § 39.

[1] 3 Railw. C. 524; s. c. 3 Hare, 593. This was a case, where the plaintiff owning a ferry, obtained an act of parliament, allowing him to build a bridge, and enacting that any persons, who should evade the tolls, by conveying passengers, &c. over the river, otherwise, than by the bridge, should subject themselves to a penalty of 40*s.* for each offence, to be recovered, in a summary way, before a justice of the peace. The defendants purchased of the plaintiff a piece of land, for a terminus, within the limits of the ferry, and a clause was inserted, in defend-

2. It is considered, that this interference is solely in aid of the legal right; that if the legal right, is free from doubt, equity may assume to decide it, or to act definitively, upon its acknowledged existence. If it is considered conjectural, and altogether problematical, equity ordinarily will not interfere, until the legal right is established, by the judgment of the appropriate legal tribunal.

3. But in their discretion courts of equity will interfere, by injunction, during the pendency of the trial, at law, to prevent irreparable injury, to avoid multiplicity of suits, and in some cases, where there is given no adequate legal redress. But where the injury is small, and readily susceptible of estimation, equity will not generally interfere, to the prejudice of the trial, at law.

4. But in this case, where the only remedy, given by the act was by recovering penalties, *de die in diem*, in a summary way, before a justice, which would not settle the right, the court directed an issue, to be tried, at law, to settle the rights of the parties, suggesting the outlines of the issue, the Master to direct the detail of the trial, and in the mean time directed the defendants, to keep an account of all passengers, and carriages, and all other things, conveyed by them, and in respect of which the plaintiff would be entitled to any payment or toll, if the same had passed over his bridge, and to furnish a copy of such account to the plaintiff, before the trial, if requested.

* 5. In a recent very elaborate case,[2] this subject is discussed very much at length, by an experienced, and learned judge, and the conclusion arrived at, that the plaintiffs' charter expressly providing, that no other railway should be authorized, by the legislature, within thirty years, leading from Boston, Charlestown, or Cambridge, to Lowell, or to any point, within five miles of the northern terminus of plaintiffs' road, it was not competent

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ants' act, that they would not erect a bridge over the river, without the plaintiff's consent, and that nothing therein contained should prejudice, or affect the right of the plaintiff to the ferry, or bridge, or to the tolls. The railway company dug a canal to the river, and by means of a steamboat conveyed their passengers from their terminus to a point, in Yarmouth, upon the opposite shore, much below the plaintiff's bridge. The form for an order, for a trial at law in such cases, will be found in the report of this case.

[2] Boston & Lowell Railway *v.* Salem & Lowell and other Railways, 2 Gray's R. 1. See *post*, § 231, where the substance of the opinion of the court, upon the constitutional question, is given.

for the defendant companies, to so connect their roads, as to make a continuous line, from Boston to Lowell, by Salem and Lawrence, even if it were conceded that the legislature might, by express grant have created a rival road, from Boston to Lowell, infringing the terms of the plaintiffs' grant. And inasmuch as the defendants had so conducted their business, as virtually to create a rival line, from Boston to Lowell, in contravention of the express terms of the plaintiffs' grant, without the express permission of the legislature, it did constitute such an infringement of plaintiffs' charter, as to be a nuisance, to their rights, for which they are entitled to a remedy. And the court accordingly granted a perpetual injunction against the infringement of plaintiffs' rights, in the manner complained of.

6. There are many other cases, taking substantially the same view, of the propriety of equitable interference, to protect corporations, against infringements of their corporate franchises.[3]

7. And it has been held, that a grant to a canal company, to * collect tolls for transportation, with an express stipulation against their being reduced by the act of the legislature, is not impaired, by the grant of a railway, along the same route, with power to take the lands of the canal, for its construction, when necessary.[4]

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[3] Newburg & Cochecton Turnpike Co. *v.* Miller, 5 Johns. Ch. 101, 111; Ogden *v.* Gibbons, 4 id. 150, 160; Croton Turnpike Co. *v.* Ryder, 1 Johns. Ch. 611. A railway bridge is an interference with the charter franchise of a toll-bridge, for a turnpike or highway. Enfield Toll-Bridge Co. *v.* Hartford & New H. Railway, 17 Conn. R. 40. And in s. c. 17 Conn. R. 454, it is considered, that the condition in the plaintiffs' charter, that no person shall erect another bridge, within the limits of Enfield and Windsor, is a part of their franchise, and not a distinct covenant. But where the charter of the toll-bridge contained no exclusive grant and no limitation, in regard to the power of future legislatures, to erect other similar bridges, it was held they had no exclusive franchise, and that an injunction would not be granted against another company, chartered by the legislature, within such distance, as to lessen the tolls of the first company. Mohawk Bridge Co. *v.* The Utica & Schenectady Railway, 6 Paige, 554. This was the case of a railway, indeed, which is not so obviously an evasion of the rights and interests, of the toll-bridge company, as a company precisely similar, but even that is no infringement, unless the charter of the first company contained an exclusive grant. Charles River Bridge *v.* Warren Bridge, 11 Pet. R. 420; Dyer *v.* The Tuscaloosa Bridge Co. 2 Porter, R. 296. See also Thompson *v.* The N. Y. & Harlaem Railway, 3 Sand. Ch. 625; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547.

[4] Illinois & Mich. Canal *v.* Chicago & Rock Island Railway, 14 Ill. R. 314.

8. An injunction was granted, at the suit of the state, to restrain a railway company, from filling up a part of the state canal, and erecting an arch over it, which would obstruct its use, although it appeared that this portion of the canal had laid in a state of abandonment for many years.[5]

SECTION XI.

INJUNCTIONS AGAINST THE INFRINGEMENT OF CORPORATE FRANCHISES IN THE NATURE OF NUISANCE.

1. *Allowed to prevent multiplicity of suits, collisions, and riots.*
2. *Lord Brougham's definition of the jurisdiction.*
3. *Definition of same by Chief Justice Shaw.*
4. *Statement of the general grounds of equitable interference.*

§ 215. 1. The cases coming under the general denomination of injunctions, to restrain nuisances to corporate franchises, are very numerous and various, too much so, by far, to be here enumerated. It is a branch of equity jurisdiction, of ancient date, and which, in modern times, has been very extensively resorted to, by the equity courts, in order to prevent irreparable damage, in various modes, as by multiplicity of suits, by collisions in the nature of riots, among the numerous champions of rival public enterprises, and for many other reasons, recommending this mode of redress, especially to public favor.[1]

2. The grounds of equitable interference, in case of nuisance, are well stated by Lord *Brougham*, in The Earl of Ripon *v.* Hobart.[2] "If the thing sought to be prohibited, is in itself a nuisance, the *court will interfere to stay irreparable mischief, without waiting for the result of a trial, and will, according to the circumstances, direct an issue, or allow an action, and if need be, expedite the proceedings, the injunction being in the mean

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5 Commonwealth *v.* Pittsburgh & Connellsville Railway, 24 Penn. R. 159.

1 Attorney-General *v.* Sheffield Gas Co. 19 Eng. L. & Eq. R. 639. This is a case where the injunction is denied upon the ground of the trivial character of the nuisance or damage, but the general grounds, of the jurisdiction of courts of equity, in such cases, being necessarily involved in the inquiry, are fully and ably discussed, by *Turner* and *Bruce*, Lords Justices, in giving their opinions. See also the opinion of Lord *Eldon*, in Attorney-General *v.* Nichol, 16 Vesey, 338, upon the same general subject.

2 3 Mylne & Keen, 169.

time continued." But, says his lordship in substance, where the thing is only liable to prove such, according to circumstances, the court will not interfere, until the matter has been tried at law. And the same general doctrine is maintained in other cases upon this subject.[3]

3. In the case of Boston and Lowell Railway *v.* Salem and Lowell Railway *et al.*[4] Chief Justice *Shaw* thus lays down the law upon this subject: —

"An injunction will generally be granted, to secure a statute privilege, of which a party is in actual possession, unless the right be doubtful."[4]

4. The equitable interference, by injunction, goes upon the ground, that the defendant's acts constitute a nuisance, and that the plaintiff sustains special damage thereby, and that the law affords no specific, and adequate remedy. Hence it is not competent for one, who suffers damage, in common with others only, to maintain a bill to enjoin a party, from the continuance of a public nuisance, under color of legislative grant.[5]

SECTION XII.

INJUNCTIONS TO PRESERVE PROPERTY PENDENTE LITE.

1. *Will not decree specific performance, where mere question of damages.*
2. *Where injunction might operate harshly, parties put under terms.*

n. 2. *Review of cases upon this subject.*

§ 216. 1. There are some cases where courts of equity have interfered, by injunction, in controversies between different railways, * to preserve the property, pending the litigation. But in a case where one railway company had leased its line and furniture, to another company, and this company proposed to disregard the contract, on the ground of its illegality; and were

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3 North Union Railway *v.* Bolton and Preston Railway, 3 Railw. C. 345; Semple *v.* London and B. Railway, 1 Railw. C. 120.

4 2 Gray's R. 1. See also upon this point, *ante*, § 214, n. 3. Livingston and Fulton *v.* Van Ingen and others, 9 Johns. R. 507; Ogden *v.* Gibbons, 4 Johns. Ch. 174; Osborn *v.* Bank of U. States, 9 Wheat. R. 738, 841.

5 Bigelow *v.* Hartford Bridge Co. 14 Conn. R. 565; O'Brien *v.* Norwich and Worcester Railway, 17 Conn. 372; Delaware and Maryland Railway *v.* Stump, 8 G. & J. 479.

about entering into an arrangement, with another company, which would be in violation of the first contract, the court declined to interfere, by injunction, as it was not clear, that the first contract was valid, or that the loss to the second company, in not entering into their proposed arrangement, with the third company, might not be greater, than their loss, from violating the first contract.[1]

2. In the English equity practice, in some cases, in consideration of the consequent delay and inconvenience, resulting from the injunctions, the courts have put the parties under terms, to obey the orders of court, and in default of complying with such orders, the injunction to issue. This is done, so as to effect substantial justice to one party, without imposing unnecessary hardship, upon the other.[2]

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[1] Shrewsbury and Chester Railway *v.* The Shrewsbury and B. Railway, 4 Eng. L. & Eq. R. 171; 1 Simons, (N. S.) 410. See also Spiller *v.* Spiller, 3 Swanst. R. 556; The Great W. Railway *v.* The Bir. and Oxford J. Railway, 2 Phillips, 597; Farrow *v.* Vansittart, 1 Railw. C. 602. The question in this case was, whether a reservation, in the lease of land, of the minerals, and the right to remove them, implied the right to erect a public railway, and the Lord Chancellor continued the injunction, to preserve the property, during the pendency of the necessary trial at law. But by a late English statute, 15 & 16 Vict. ch. 86, sec. 61, courts of equity are authorized, in cases where they deem a trial at law unnecessary, to determine the question themselves. Under this statute the equity courts often avail themselves, as by the 14 & 15 Vict. ch. 83, § 8, they are allowed to do, of the assistance of one of the common-law judges. And it is held that the court will still, in a proper case, give leave to the party, to bring an action at law. Hodges, 676; *ante*, § 190.

[2] Northam Bridge and Roads *v.* The London and Southampton Railway, 1 Railw. C. 653. This is a case, where the plaintiff prayed for an injunction upon defendants, from crossing their road, except by means of a bridge. The question of right being sent to the Court of Exchequer, and determined in favor of plaintiffs, the Chancellor, upon the defendants undertaking to build the bridge with all possible dispatch, held, that an injunction ought not to be granted, during the time, that must necessarily elapse, in building the bridge.

See also Spencer *v.* London and B. Railway, 1 Railw. C. 159; Jones *v.* Great Western Railway, 1 Railw. C. 684; London and Birm. Railway *v.* The Grand Junc. Canal Co. id. 224; Attorney-General *v.* The Eastern Counties Railway, 3 Railw. C. 337; Langford *v.* The Brighton L. & H. Railway, 4 Railw. C. 69. This was a controversy in regard to the payment of the price of land, which was in dispute between the parties. The bill prayed, that the defendants be restrained from going forward with their works, until they shall have paid the amount demanded. The court held, they would not interfere, by injunction, to

*SECTION XIII.

INJUNCTIONS RESTRAINING PARTIES FROM PETITIONING LEGISLATURE.

1. *Right claimed to exist, but rarely exercised, by courts of equity.*
2. *Not sufficient, that it will interfere with rights of other parties.*
3. *Where right doubtful may be sent to court of law for determination.*

§ 217. 1. The jurisdiction of courts of equity to restrain parties from petitioning parliament, in fraud of their own contracts, seems to have been assumed to exist, in numerous cases, but its exercise is rare, and with marked circumspection.[1] In a late case[2] the Lord Chancellor *Cottenham* said: "In a proper case, I should not hesitate to exercise the jurisdiction of this court, by injunction, touching proceedings in parliament, for a private bill, or a bill respecting property, but what would be a proper case for that purpose, it may be very difficult to conceive."

2. But it was here distinctly held, that it is not enough to justify such an interference, that the object of the application was to interfere with some right, or interest, of some other party. For every act of the legislature, which is promoted, by private parties, is intended, more or less, to affect private interests of other parties. As for instance a railway very essentially affects the interests of those land-owners, through whose lands it passes, and a private interest resulting from ownership of property is as sacred as that which rests upon contract. But no one would suppose, that because the company had obtained an act, or even given notice of taking land, that a court of equity would, at the suit

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stop the works, if perfect justice can be done, by compelling the company to pay for the land, but will order the proximate value to be deposited, until the amount be determined.

[1] The Stockton & Hartlepool Railway *v.* Leeds & Th. & Clarence Railways, 2 Phill. 666. In this case Lord *Cottenham*, Chancellor, says: "There is no question whatever about the jurisdiction. This is the case of a petition against the Clarence company obtaining an act, enlarging their powers, and authorizing the amalgamation of the four companies, upon the ground that the plaintiffs having come into the arrangement, it was a fraud in them to oppose the act, by which it was to be effected. But the court refused the injunction, upon the ground, that the contract was merely inchoate."

[2] Heathcote *v.* The North Staffordshire Railway, 6 Railw. C. 358.

of the *land-owners, enjoin the company from applying to parliament, to be released from their undertaking. This would still leave them liable to the land-owners, the same as before. Such is the substance of the opinion of the learned Chancellor in the last case cited.

3. In a case where the construction of the act of parliament is doubtful, the question was sent to a court of law, the injunction being continued in the mean time, under such modification, as to enable the defendants to perform a condition precedent in their contract with land-owners; and it was said that mere inconvenience could not be viewed, in the light of injury, and that companies have a right to carry on their railway, according to the plan laid down in their act, although a junction contemplated, in procuring the act, may be frustrated, by the abandonment of the line.[3]

SECTION XIV.

INTERFERENCE OF COURTS OF EQUITY IN THE SALE AND DISPOSITION OF THE EFFECTS OF INSOLVENT COMPANIES.

1. *Will interfere to save costs and litigation.* | 2. *All parties interested may come in.*

§ 218. 1. Where there are sundry *fi. fas.* against a railway company which is insolvent, and it is threatened to levy upon and sell the road, with its equipments, equity will take jurisdiction, direct a sale for all concerned, and distribute the funds to such, as shall show themselves entitled, according to the usual course of the courts of equity, in marshalling assets.[1]

2. In such a proceeding, any one, who has a claim upon the fund, but who is not a party to the suit, may become a party, by presenting his claim, before the Master, or under the decree, before it becomes final.[1] But if he neglects to do so, equity will not aid him in setting it aside.[1] Equity will not relieve against

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[3] Clarence Railway *v.* The Great N. of England, Clarence & Hartlepool Railway, 2 Railw. C. 763. See also Attorney-General *v.* Manchester & Leeds Railway, 1 Railw. C. 436.

[1] Macon & Western Railway *v.* Parker, 9 Georgia R. 377. A query is here suggested, whether the railway bed and superstructure are liable to the levy of the execution. At all events, they cannot be sold in fragments, or distinct portions, upon an execution.

a judgment recovered, through the negligence of the defendant.[2]

*SECTION XV.

MANNER OF GRANTING AND ENFORCING EX PARTE INJUNCTIONS.

1. *Such injunctions especially liable to abuse.*
2. *In important cases not allowed, except upon notice to other party.*
3. *Injunction commonly dissolved, upon answer, denying equity.*
4. *Remarks of Lord Cottenham upon this subject.*
5. *Party who obtains such injunction, on imperfect state of facts, liable to costs.*

§ 219. 1. The general mode of obtaining *ex parte* injunctions is sufficiently understood to be by bill, verified by the oath of the party, and accompanying affidavits. This gives very great advantages always, to unscrupulous suitors, and in a country where chancery practice is not a distinct department of the profession, so as to create always the highest standard of professional delicacy, and where it is too much the course of public opinion, to justify any degree of professional subserviency, to serve the purposes of clients, there are few instruments, in the range of legal proceedings, more susceptible of irreparable abuse, than an *ex parte* injunction, out of chancery.

2. Hence in modern times, when they are sought for the purpose of staying the operations of great public enterprises, either in construction, or operation, it has been more usual, not to allow them, except upon notice to the defendant, and on opportunity to produce affidavits, in exculpation.

3. The injunction is always dissolved upon the defendant's answer, filed gratis,[1] denying the equity of the bill, unless for special reasons, the court, on affidavits, upon both sides, sees fit to order its continuance, either absolutely, or upon terms.[2]

4. The remarks of Lord Chancellor *Cottenham*, are fit to be here inserted perhaps: "A very wholesome rule has been established in this court; that if a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he shall not then be permitted to support the injunction, by showing another state of

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2 Bruner *v.* Planters' Bank, 23 Miss. 406.

1 The Attorney-General *v.* The Mayor of Liverpool, 1 Mylne & C. 171.

2 Warburton *v.* The London & Blackwall Railway, 1 Railw. C. 558.

circumstances, in which he would be entitled to it; because the jurisdiction of the court in granting *ex parte* injunctions is obviously a very * hazardous one, and one which, though often used to preserve property, may be often used to the injury of others; and it is right that a strict hand should be held over those who come with such applications. The objection here taken is not that the facts were not stated, but that the whole law was not stated; that is to say, that the attention of the court could not have been called to certain provisions of the act, which would have presented a different view of the case in the mind of the judge. If fault is to be found with any one, it is, I am afraid, with the court, which is bound to know every clause in every act ever passed,—a degree of knowledge hardly to be hoped for. I never heard the rule carried to this extent, that the party applying is bound to lay the whole law before the court. I do not find that any misstatement or omission of any important facts was made on the present application; nor am I at all aware, if the whole law of the case, as far as it can be collected from the act of parliament, had been brought under my view, that upon the statement in the affidavit that the defendants were immediately proceeding to act, I should have thought this a case in which it was expedient to permit the defendants to go on until an opportunity was given to have the matter fully heard and discussed. I have nothing to do with any feelings which may be excited in Liverpool on the subject, the court can only look to the question as a matter of property, and as a matter of property this is the most innocent injunction that could possibly be granted, as indeed is proved by the fact that the defendants have waited fourteen days before they applied to dissolve it. They will still have ample time to carry into effect the plan which they have adopted, and which they have adopted from very good motives. Whether they have a right to carry it into effect it is not now my intention to determine; my object being to let things remain as they are, until this important question can be regularly brought on for solemn argument and decision.

" In many cases the court feels that, by granting an injunction *ex parte*, it may be doing an act of extreme injustice. The party against whom such an injunction is granted may possibly be exposed to very great injury by the order being enforced; but when, as here, the injunction is to prevent an alteration in the

state of property, to prevent the corporation seal from being put to securities, until an opportunity is afforded of having the matter fully discussed, it is not in point of property an injunction which can occasion any mischief whatever."

*In another case[2] the same learned judge puts forth some very pertinent strictures upon the bad taste, and bad morals, of litigation in courts of equity, upon grounds quite one side of the merits of the real controversy, and matter in dispute: "It is very necessary, that this court should deal very strictly with companies, and prevent them, with the large powers that are given to them, by acts of parliament, from defeating the rights and interests of individuals. But it is the duty of the court to take care, that, if individuals avail themselves of any omission of any power on the part of the company, this court should not assist those individuals, in extorting money from the company. It is the duty of the court in every case, to steer clear of these two opposite extremes; and if there should be some omission which may give a party a legal right against a company, the court would leave that individual to his legal means of taking advantage of it."

5. Where an *ex parte* injunction is granted, upon a state of facts not fully disclosing the case, and is subsequently dissolved, upon a further development of the real facts, on the part of the defendant, it should generally be done with costs to defendant.[3]

And if the party obtains an *ex parte* injunction upon one state of facts, which turns out upon trial not to be true, or not to be the fair state of the full case, he cannot fall back, upon another state of facts, which is established, and which would also entitle him to an injunction. But sometimes in such cases, the injunction is discharged without costs.[4]

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[2] Bell *v.* The Hull and Selby Railway, 1 Railw. C. 636.

[3] Illingworth *v.* Manchester and Leeds Railway, 2 Railw. C. 187. Upon this point the Chancellor says: "Is the evil which has arisen from the injunction having been made, and the expense of having it discharged, to be attributed to the error of the court, or to the false representation of the case by the plaintiffs? Certainly the latter. The costs were therefore properly given to the defendants." Semple *v.* London and Birmingham Railway, 1 Railw. C. 480, 493.

[4] Greenhalgh *v.* M. and Birmingham Railway, 1 Railw. C. 68; Attorney-General *v.* The Mayor of Liverpool, 1 My. & Cr. 171, 210.

*SECTION XVI.

RIGHT TO INTERFERE BY INJUNCTION LOST BY ACQUIESCENCE.

1. *Acquiescence to extinguish right, must have operated upon other parties.*
2. *Delay, to learn the extent of injury, will not estop the party.*
3. *Acquiescence has been held not always perfectly to express the idea.*

§ 220. 1. The right to interfere by injunction is one, that should always be asserted, on fresh suit, or it will be regarded, as voluntarily waived, and lost by acquiescence.[1] But if the acquiescence is explainable, upon other grounds, than that of waiver of right, and can be clearly seen not to have, in any sense, invited, or confirmed, the conduct of the other party, it will not conclude the right to interfere in this mode.[1]

2. Mr. Hodges says, upon this subject, not inappropriately altogether, it is to be feared: "To a very considerable extent each case will be governed by its own particular circumstances; and it has been said, on this subject, that there are two arguments invariably adduced, by public companies. If the plaintiff comes to the court, complaining of an injury, at the first commencement, it is said, that the damage is trifling, and the motion is trifling, and vexatious; if he waits till it has assumed a graver shape, it is then said, that he has acquiesced, and is therefore precluded from complaining."[2]

3. The kind of acquiescence which will conclude a party, has been defined, by eminent equity judges, as being something not well expressed by that term.[3] "Now acquiescence is not the

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[1] *Ante*, § 198; Illingworth *v.* The Manchester & Leeds Railway, 2 Railw. C. 187; Semple *v.* The London & Birmingham Railway, 1 id. 120; Greenhalgh *v.* The Manchester & B. Railway, 1 id. 68; 3 My. & Cr. 784; The Birmingham Canal Co. *v.* Lloyd, 18 Vesey, 515; Attorney-General *v.* The Manchester & Leeds Railway, 1 Rail. C. 436. See also Great N. Railway *v.* Lancashire & Yorkshire Railway, 1 Sm. & Gif. 81; *ante*, § 62.

[2] Great Western Railway *v.* Oxford, Worcester, & Wolverhampton Railway, 3 De G., Mac. & Gord. 341; 10 Eng. L. & Eq. R. 297; Ffooks *v.* London & S. W. Railway, 19 Eng. L. & Eq. R. 7; Innocent *v.* The North Midland Canal Co. 1 Railw. C. 250; cases cited n. 1, Am. ed.; Mott *v.* Blackwall Railway, 2 Phill. 632; Graham *v.* Birkenhead Junction Railway, 2 Mac. & G. 160.

[3] Lord *Cottenham*, Chancellor, in Duke of Leeds *v.* Earl of Amherst, 2 Phill.

term * which ought to be used. If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection, while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence."

SECTION XVII.

MANDATORY INJUNCTIONS SOMETIMES ALLOWED.

1. *Injunctions may produce mandatory effect, but must be specific.* | 2 *A decree for specific performance is a mandatory injunction.*

§ 221. 1. It has been held, that it is no objection to an injunction, that it was in effect of a mandatory character.[1]

But all injunctions should be specific and intelligible; and it is well said, in regard to an injunction, restraining the company from taking and using any more of the plaintiff's land, than is necessary, for the purpose of making and maintaining the railway and works, authorized by the act, by Lord Chancellor *Cottenham*:—

"I do not believe the vice-chancellor intended, that the injunction should be in this form, when he decided the question; and this appears to be a very objectionable form of order."

It is there held, that the injunction should be so expressed, as to inform the defendant of the precise limits of his right, and not expose him, in the exercise of such right, to the consequence of violating so vague an injunction.[2]

2. But it has been common to produce a positive effect, through * an injunction out of chancery, by means of a prohibi-

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Ch. Cases, 117, 123; Lee *v.* Porter, 5 Johns. Ch. 268, 272; Perine *v.* Dunn, 3 Johns. Ch. 508; Lee *v.* Munroe, 7 Cranch, 366; opinion of *Coalter*, J., Taylor *v.* Cole, 4 Munford, 351. Hentz *v.* The Long Island Railway Co. 13 Barb. 647, was where a party whose land had been taken by a railway company, might have insisted on compensation being paid, at the time, but neglected to do so, and forbore to assert his right, until after the road was completed, and in full operation, and when an interruption of its business would be seriously injurious, and it was held, that an injunction should not be granted, until all the ordinary means for obtaining an indemnity have failed.

[1] Great North of England, Clarence & Hartlepool J. Railway *v.* The Clarence Railway, 1 Coll. 507; The Earl of Mexborough *v.* Bower, 7 Beavan, 127.

[2] Cother *v.* Midland Railway, 2 Phillips, 469; 5 Railw. C. 187.

tory order.[3] And notwithstanding the practice has been questioned sometimes,[4] it has continued to receive the countenance of the courts of equity.[5] A mandatory order is nothing more than a decree of specific performance, which is every day's practice, in courts of equity, and which is seldom denied, unless where the remedy at law is perfectly adequate.[6]

SECTION XVIII.

REMEDY PROVIDED IN CHARTER DOES NOT SUPERSEDE RESORT TO EQUITY.

1. *Special provisions of charter, do not commonly affect the jurisdiction of courts of equity.*
2. *Recent English statutes supersede such jurisdiction chiefly, in suits at law.*

§ 222. 1. In most of the cases, where the court interferes, by injunction, in favor of land-owners, and others, the party has a remedy under the provisions of the act. But this does not defeat the jurisdiction of the court, under the usual restrictions and limitations, which regulate the jurisdiction of courts of equity, in regard to legal rights.[1]

2. It is now understood, by the profession doubtless, that by the recent statutes in England, it is competent to obtain an injunction, at law, at the time of issuing the summons in the action; and at the final hearing, such injunction may be made perpetual, or discharged, as justice shall require; and in case of disobedience, such writ of injunction may be enforced by the court, by attachment, or, when such court shall not be sitting, by a single judge at chambers. This injunction may also be

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3 Lane *v.* Newdigate, 10 Vesey, 192.

4 Blakemore *v.* The Glamorganshire Canal, 1 My. & K. 154.

5 *Shadwell*, V. C., in Spencer *v.* London & Brighton Railway, 1 Railw. C. 171.

6 2 Story, Eq. Jur. § 727 *et seq.*; Sears *v.* Boston, 16 Pick. R. 357. But where the plaintiff's part of an agreement consisted in devoting himself to the service of a company, agreed to be formed, for the purpose of testing and turning to account certain patents of plaintiff's, which were also agreed to be conveyed to the company when formed, the court declined to decree specific performance of the contract, on the part of defendant, inasmuch as they had no power to compel specific performance of the contract on the plaintiff's part. Stocker *v.* Wedderburn, 30 Law Times, 71. See also Dietriehsen *v.* Cabburn, 2 Phill. 52. Lumley *v.* Wagner, 1 De G. M. & G. 604.

1 Coats *v.* The Clarence Railway, 1 R. & M. 181.

applied for, at any stage of the proceedings, at law. These statutory provisions serve pretty effectually to supersede the necessity of any resort to courts of equity, in aid of legal rights and remedies, in the courts of common law, in Westminster Hall.

*SECTION XIX.

WILFUL BREACHES OF INJUNCTIONS.

1. *Statement of case.* | 2. *Opinion of Vice-Chancellor.*

§ 223. 1. In a late case, before Vice-Chancellor *Knight Bruce*,[1] an injunction had issued, restraining the defendants from further interfering with a particular road, and from so constructing their works, as to obstruct, impede, or render less secure such road. The company then laid their permanent rails over the road, on a level, and by direction of the commissioners of railways, erected gates across the road, for the security of passengers, and with the sanction of the commissioner, opened the line for public traffic. The court, on application to punish the company, for disobedience of the order, directed a sequestration to issue, and refused to suspend the order, until an appeal could be heard, under the particular circumstances. The language of the learned judge is worth repeating:—

2. "Then comes the question, what, if any thing, the court ought to do—because it does not necessarily follow, that the process asked must issue. It is upon the defendants, however, to make a case to exempt them from it; and perhaps, if they had shown their proceedings not to be plainly and clearly illegal—I mean illegal independently of any question of contempt—or had satisfied the court that the injunction ought not to have been granted at all, or ought to be dissolved, discharged, or put into a shape more favorable to them than it is; or had stated that they had appealed from it, or from the order granting it, or intended to do so, I might have declined or delayed allowing the process to go. But none of these things have they done. On

[1] The Attorney-General *v.* The Great Northern Railway, 3 Eng. L. & Eq. R. 263; Attorney-General *v.* London & Southwestern Railway, 3 De G. & Smale, 439.

the contrary, my belief is strengthened of the utter impropriety, without any reference to the injunction or this suit, of the acts alleged to be also a contempt of this court. My opinion is more fixed, that the injunction, instead of going too far, does not go far enough, and that it is one of which the company cannot justly complain. Considering their conduct to be at once contemptuous and otherwise *illegal; to be wrongful as against the plaintiff individually, wrongful as against her Majesty's subjects at large, and, indeed, a bad—I had almost said a scandalous—example; whatever amount of inconvenience may result from acting against the company on this occasion, I think it right to deal with them according to their merits. The consequence may possibly be to stop the railway. I answer again that it ought to be stopped, for it passes where it does, by wrong. The directors of the company, their agents and servants, cannot, on this motion, be committed to prison; but what can be done shall by me be done to repress this daring invasion of public and private rights—an invasion maintained moreover in open defiance of all law, authority, and order. Let a sequestration issue."

SECTION XX.

QUESTIONS OF COSTS IN EQUITY.

1. *Costs most commonly awarded to prevailing party.*
2. *If parties compromise merits, court will not decide question of costs.*

§ 224. 1. Costs, in courts of equity, do not follow the result of the decision, as in cases at law. It is requisite that the court order costs, to entitle the party to claim them.[1] But it is now the settled practice of the courts of equity, to give the prevailing party costs,[2] unless there are some very peculiar circumstances, whereby he is not entitled to claim costs, as that of a mortgagee in possession, who has not been offered the amount due upon the mortgage;[3] and some others.

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1 Travis *v.* Waters, 1 Johns. Ch. R. 85; s. c. 12 Johns. R. 500.

2 Perine *v.* Swaim, 2 Johns. Ch. 475.

3 Catlin *v.* Harned, 3 Johns. Ch. R. 61. And in a recent English case, Stocker *v.* Wedderburn, 30 Law Times, 72, Vice-Chancellor *Wood*, having given judgment against the plaintiff on demurrer, ordered that he should pay costs, notwithstanding the general equity of his claim, saying, "I am not bound to assume

2. But courts of equity have always declined to determine a question of costs merely.[4] If the parties have compromised the merits of the cause, or referred it to arbitrators, and reserved the question of costs, for the court of equity, that court will ordinarily decline to try the whole case, in order to determine a question of costs, but will leave each party to pay its own costs.[4]

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* CHAPTER XXIX.

INDICTMENT.

SECTION I.

INDICTMENTS AGAINST RAILWAY COMPANIES.

1. *Are liable to indictment for obstructing public highway.*
2. *Corporations liable to indictment for misfeasance, as well as nonfeasance.*
3. *Not liable to indictment for disturbing quiet, by proper use of locomotives.*
4. *Where the company have the right to divert highways, it is for the jury to determine, whether it is done in a reasonable manner.*
5. *All that is requisite is, that it produce no serious public inconvenience.*
6. *Order, or conviction of company, in relation to repair of highways, may be general.*
7. *Signals required to be given, at highway crossings, on level.*

n. 2. *Review of the cases upon the subject.*

§ 225. 1. Railway companies are liable to indictment for obstructing a public highway, contrary to the powers granted in their act. For instance, obstructing a carriage turnpike-road, by the piers of a railway bridge.[1] So also, for cutting off a public highway, and obstructing travel upon it, without, and before,

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that all the allegations in the bill are true for the purpose of determining who shall pay costs; otherwise in every case defendants might be driven to defend a case up to the hearing, instead of demurring, in order to save costs.

[4] Lord *Hardwicke*, in 2 Vesey, sen. 222, 223, 284; Chancellor *Kent*, in Eastburn *v.* Downes, 2 Johns. Ch. R. 317. But some exceptions have been reluctantly admitted, under protest. Tower *v.* Eastern Counties Railway, 3 Railw. C. 374.

[1] Reg. *v.* Rigby, 6 Railw. C. 479. The footpaths upon the bridge are not to be reckoned, as a part of the requisite width of the bridge. *Ante*, § 105.

constructing a substitute, in the manner required by their act.[2]

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[2] Queen *v.* Scott & others, 3 Q. B. R. 543. This is an indictment against the officers and agents of the company. But it is held the company is also liable to indictment. Queen *v.* Great N. of Eng. Railway, 9 Q. B. R. 315; State *v.* Vermont Central Railway, 27 Vt. R. 103. *Ante*, § 169; Commonwealth *v.* Nashua & Lowell Railway, 2 Gray, 54; Springfield *v.* Conn. River Railway, 4 Cush. 63; Commonwealth *v.* New Bedford Bridge Company, 2 Gray, 339. This subject was very considerably discussed in Regina *v.* Birmingham & Gloucester Railway Company, 9 C. & P. 469; s. c. 3 Q. B. 223, and the same result reached, as in the late case of Regina *v.* Great North of England Railway. The opinion of *Patteson*, J., 3 Q. B. 231, when the former case was determined, in the Queen's Bench, embraces a brief and comprehensive abstract of the earlier English decisions, upon the subject.

"Upon the argument it was not contended on the part of the company that an action of trespass might not be maintained against a corporation; for, notwithstanding some dicta to the contrary in the older cases, it may be taken for settled law, since the case of Yarborough *v.* The Bank of England, 16 East, 6, in which the cases were reviewed, that both trover and trespass are maintainable; but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this position; and it is a *dictum* of Lord *Holt* in an anonymous case reported in 12 Mod. 559. The report itself is as follows: 'Note: per *Holt*, Ch. J. A corporation is not indictable, but the particular members of it are.' What the nature of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults. Hawk. P. C. B. 1, c. 66, § 13, Vol. ii. p. 58, 7th ed.

"A corporation aggregate may be liable by prescription, and compelled to repair a highway or a bridge. Hawk. P. C., B. 1, c. 76, § 8; c. 77, § 2, Vol. ii. pp. 156, 258; and in the case of Rex *v.* The Mayor, &c. of Liverpool, 3 East, 86, the corporation were indicted by their corporate name for non-repair of a highway, and, upon argument, in this court, the indictment was held to be defective; but no question was made as to the liability of a corporation to be indicted.

"In the case of Rex *v.* The Mayor, &c. of Stratford-upon-Avon, 14 East, 348, the corporation was indicted by its corporate name for non-repair of a bridge, and found guilty, and upon argument in this court, the verdict was sustained, and no question made as to the liability generally of a corporation to an indictment for breach of a duty cast upon it by law.

"Upon the discussion of the question in the present case, the counsel for the company relied chiefly upon the circumstance of the indictment being found at the Quarter Sessions, (it was so put, hypothetically, in the argument for the defendants,) where the company could not appear and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the sessions must be in person. We think there is no weight in this objection.

*2. It has sometimes been maintained, that a corporation aggregate is not liable to indictment for misfeasance, but only for *nonfeasance. But the case of Reg. *v.* G. N. of England Railway settled that question, upon elaborate argument and great consideration.

It was held that where the surveyors of highways object to a road, which has been substituted for a former road, they are not authorized to obstruct it, but must enforce the usual legal remedies upon the company, by mandamus, indictment, or bill in equity, as the case may be.[3]

It may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by *certiorari* into this court in order to make it effective; but the liability of the corporation is not affected.

"In the case of Rex *v.* Gardner, 1 Cowp. 79, it was objected that a corporation could not be rated to the poor, because the remedy by imprisonment upon failure of distress was impossible; but the court considered the objection of no weight, though it might be that there would be some difficulty in enforcing the remedy.

"The proper mode of proceeding against a corporation, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by *certiorari*, as suggested by Mr. Baron *Parke* in this very case, reported in 9 Car. & Payne, 469, and as appears by Hawk. P. C., B. 2, c. 27, § 14, Vol. iv. p. 140, and the cases cited in 6 Vin. Abr. 310, &c. tit. Corporations, (B. a.) Vol. iv. p. 140.

"We are therefore of opinion that upon this demurrer there must be judgment for the crown."

In this country the subject has been somewhat discussed, and variously determined. In addition to the cases already cited in this note from the American reports, we may here refer to State *v.* Morris and Essex Railway Company, 3 Zab. 365, where the general views stated in the text are maintained. This case was on an indictment against the Morris and Essex Railway Company for a nuisance, in erecting and continuing a building, and also for leaving their cars in the public highway, and the indictment was sustained, the court saying that "a corporation cannot be liable for any crime of which a corrupt intent, or *malus animus* is an essential ingredient. But the creation of a mere nuisance involves no such element."

See also Lyman *v.* White River Bridge Co. 2 Aiken's R. 255; Dater *v.* The Troy Turnpike and Railway Co. 2 Hill, 629; Bloodgood *v.* Mohawk and Hudson Railway, 18 Wendell, 9; Chestnut Hill Turnpike Company *v.* Rutter, 4 S. & R. 6, 16; Whiteman *v.* W. & S. Railway, 2 Harr. 514.

The English courts make no question in regard to corporations aggregate being liable for torts, committed by their agents in the proper business of the company. Glover *v.* The N. W. Railway, 19 Law J. 172; Duncan *v.* Surrey Canal Company, 3 Starkie, R. 50.

[3] London and Brighton Railway *v.* Blake, 2 Railw. C. 322.

3. But where by their act a railway company are permitted to build their road, and run locomotive engines parallel and adjacent to an ancient highway, whereby the horses of persons using the highway, as a carriage road, are frightened, it was held, on indictment against the company for a nuisance, that this interference with the rights of the public must be taken to have been contemplated, and sanctioned, by the legislature, and that the company were therefore not liable.[4]

4. By their charter a company were empowered "to divert, or alter, any roads or ways, in order the more conveniently to carry *the same over or under the railway." The company, in carrying a road under the railway, had erected a skew bridge, which diverted the road, at an angle of 45° instead of 34°, which was the angle made at that particular point, by the old line of road. At the trial of an indictment against the company's engineer, for so doing, the learned judge directed the jury, that if the public sustained inconvenience, by the alteration, they should find for the crown. But if they thought that no material practical inconvenience was sustained, by the public, in having the present bridge instead of the other, and that an experienced engineer would have so constructed it, having regard both to the interest of the public and the company, they had a right to make such diversion, and the verdict should be for defendant. The verdict being for defendant, with leave to move the full bench to enter a verdict for the crown, and the question being discussed, the court declined to interfere.[5]

5. Lord *Denman*, Ch. J., said: "It is impossible, that a verdict should be entered for the crown. In the case of obstruction of light, we leave it to the jury, whether any real inconvenience is sustained, though some light may demonstrably be obscured." *Parke*, B., said at the trial, "that in a case before him, Regina

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4 The King *v.* Pease, 4 Barn. & Ad. 30. It is made a question how far a nuisance may be justified, upon the ground that public benefits have resulted from the works, causing the alleged nuisance. The King *v.* Russell, 6 B. & C. 566. In this case the affirmative is held by two judges, against Lord *Tenterden*, Ch. J.

One would conjecture that the opinion of the chief justice is the law, upon that subject. But there can be little doubt, perhaps, that when the legislature allow that to be done, which would otherwise be a nuisance, it will be valid, upon the ground that they are the proper judges, when the public good requires the works. The King *v.* Morris, 1 B. & Ad. 441.

5 The Queen *v.* Thorpe, 3 Railw. C. 33.

v. London and Southampton Railway, as to the power which a company had to make a road over a public highway, he laid it down, that if possible, the work must be constructed without any inconvenience to the public, but if it could not be done, without some such inconvenience, it must be done with the least possible."

6. An order of justices upon a railway for repair of a highway, in regard to damage done by them, need not state the particulars of damage, or repair, it is sufficient to state the length of the damaged part of the road, and order the company to make good all damage done. The order, and conviction for disobedience, may include several highways in the same parish.[6]

7. A statute requiring signals to be given, by the whistle, or bell, of the locomotive, within certain prescribed distance of any crossing of a highway upon a level with the railway, requires the signal before the crossing, and not after.[7]

Indictment to recover the fine imposed upon a railway, where the life of a person is lost by carelessness thereon, must be against the company and not against the individual stockholders, and *when the fine goes to the surviving relatives of the deceased, the indictment should show, that there are such surviving relatives.[8]

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6 London and North W. Railway *v.* Wetherall, 2 Eng. L. & Eq. R. 265.

7 Wilson *v.* Rochester and Syracuse Railway, 16 Barb. 167.

8 State *v.* Gilmore, 4 Foster, R. 461. A railway company, duly authorized to lay their track in one of the streets of a city, are not, without proof of negligence, liable for accidental injuries resulting to individuals thereby. Proof of negligence, or want of care or skill, in the manner of constructing and maintaining the track, is necessary, to entitle a person, whose property sustains damage thereby, as by a horse catching the hoof between the rails of the track, to maintain an action therefor. Mazetti *v.* N. Y. & Harlaem Railw. 3 E. D. Smith, 98.

SECTION II.

HOW FAR RAILWAYS MAY BECOME A PUBLIC NUISANCE.

1. *Use of public streets of a city, by permission of city authorities, by railway, not a nuisance.*
2. *But the use of locomotives, in vicinity of a church, on Sunday, may become a nuisance.*
3. *City authorities may grant railway leave to use streets, or to tunnel.*
4. *But company must not unnecessarily interfere with comfort of others in such use.*
5. *The slight obstruction of navigable waters, by railway company, authorized by act of legislature, not a nuisance.*
6. *Such grants construed strictly. Any excess of authority becomes a nuisance.*
7. *Company not justified in building stations, for passengers, or freight, in highway.*

§ 226. 1. A railway passing through the streets of a populous village, or city, is not of course a nuisance.[1] But it has been held, that a city has such interest in the soil of their streets, that the legislature cannot empower a railway company to use them, for a railway track, without compensation, and that it pertains to the corporation of a city to determine the mode of propelling cars within its limits, whether by steam or horse-power, and the rate of speed.[2]

2. It was held, that a railway company, having by running their cars, and engines, and ringing bells, whistles, letting off steam, &c., upon Sunday, in the immediate vicinity of a church, so annoyed and molested the congregation worshipping there, as greatly to depreciate the value of the house, and render the same unfit for religious worship, were liable to an action, at the suit of the church in its corporate capacity.[3]

3. A railway may use the public streets for their vehicles, by license from the city authorities, when such use does not unreasonably abridge the public use of such streets, for other purposes.[4] *Where a railway was authorized by the municipal

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1 Hentz *v.* Long Island Railway, 13 Barb. 646.

2 Donnaher *v.* The State, 8 Sm. & Mar. 649.

3 First Baptist Church in Schenectady *v.* S. & T. Railway, 5 Barb. R. 79. But see Same *v.* The Utica & Sch. Railway, 6 Barb. 313, where it is held that the action will not lie, in the name of the corporation, the damage being to the worshippers, and not to the corporators. But from a note to this case, it appears, that it was decided, before that, reported 5 Barb. 79, and probably not brought to the attention of the court, in that case.

4 Drake *v.* Hudson River Railway, 7 Barb. 508.

authorities of a city, to build a tunnel through the city, an injunction was denied, at the suit of a land-owner, claiming the work to be a nuisance.[5]

4. On demurrer to a declaration, alleging, that a railway company obstructed a public street, adjoining the plaintiff's house, that they kept up dangerous fires, and did various other acts, that made his residence unwholesome, and uncomfortable, and that they did these things unlawfully, and with intent to injure him, it was held, to be a good cause of action, as the court could not presume such acts to be lawful, under the particular circumstances; but if the company claimed the right to do such acts, at the time and place, it was incumbent upon them to show such right, by plea, or otherwise.[6]

5. And it was held, that the slight, but unavoidable obstruction of public navigable rivers, by a railway company, under the authority of the state legislature, is a necessary evil, which must be borne, for the sake of the public good, which demands it. That which would otherwise be a nuisance, if done under the authority of law, for the public good, is justifiable.[7] It has been held also, that grants to a railway company, or similar public work, which unavoidably cause obstruction to the navigation of a navigable river, are not to be regarded, as *per se* a nuisance, but lawful.[8]

6. But such grants are to be construed strictly, and if built upon a plan, which would occasion obstruction to the navigation, beyond what the charter authorized, the works would be a nuisance.[8] Every erection in a navigable river, without legislative permission, which obstructs navigation, is a nuisance.[8] So, too, where a railway company, by a wrong construction of their act, locate their road, where they are not authorized, it becomes a nuisance on every highway it touches, in its illegal course.[9]

7. Railways are not justified in building depots, for freight, or

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5 Hodgkinson *v.* Long Island Railway, 4 Edwards, Ch. R. 411.

6 Parrot *v.* The C., H. & D. Railway, 3 Ohio St. R. 330.

7 Attorney-General *v.* Hudson River Railway, 1 Stockton (N. J.) Ch. R. 526.

8 Newark Plank-Road Co. *v.* Elmer, 1 Stockton (N. J.) Ch. R. 754.

9 Commonwealth *v.* Erie & Northeast Railway, 27 Penn. R. 339; Same *v.* Vt. & Massachusetts Railway, 4 Gray, 22; Same *v.* Nashua & Lowell Railway, 2 Gray, 54; Same *v.* New Bedford Bridge, id. 339, 345.

passengers, within the limits of the public highway, or so near it, that their trains must injuriously obstruct the public travel. The right of the public, in the highway, is paramount to that of the company, for all other purposes, except that of transit.[10]

*SECTION III.

INDICTMENT FOR OFFENCES AGAINST RAILWAYS.

1. *Railway tickets chattels. Railway pass subject of forgery.*
2. *Under the English statute, indictments for obstructing railway carriages, or endangering persons therein.*
3. *Loss of railway ticket. Negotiability of same.*

§ 227. 1. If one obtain a railway ticket from the company, by false pretence, and thus is enabled to travel upon the railway, this is an offence, for which an indictment will lie.[1] And if such ticket be fraudulently taken, it is larceny, although the ticket would have been delivered up, at the end of the journey.[2] The forging of a railway pass is an offence at common law, but the mere uttering of it is no offence, unless some fraud was actually perpetrated.[3] "A railway ticket is a valuable chattel, and an indictment for obtaining it, of one of the company's servants, by false pretences, is sustainable, although it is to be given up at the end of the journey; that does not prevent it, while of value to the holder, as enabling him to travel gratis, from being a chattel, the stealing of which, or obtaining by false pretence, and with intent to defraud the company, is an offence."[4]

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[10] State *v.* Morris & Essex Railway, 1 Dutcher (N. J.) R. 437; s. c. 3 Zab. 360; State *v.* Vermont Central Railway, 27 Vt. R. 103. See also Commonwealth *v.* Nashua & Lowell Railway, 2 Gray, 54; Same *v.* New Bedford Bridge, id. 339; Same *v.* Vt. & Mass. Railway, 4 Gray, 22.

[1] 7 & 8 Geo. 4, ch. 29, § 53; Reg. *v.* Boulton, 19 Law J. (M. C.) 67; 3 Cox, Cr. Ca. 576.

[2] Reg. *v.* Beecham, 5 Cox, Cr. Ca. 181.

[3] Reg. *v.* Boult, 2 Car. & K. 604.

[4] Reg. *v.* Boulton, 2 Car. & K. 917, opinion of *Parke*, B., in Exch. Chamber. The newspapers speak of a case in the Common Pleas, in Ohio, where it has recently been decided, that the loss of a railway ticket, by a passenger, falls upon the purchaser, the ticket being negotiable by delivery, any one could ride upon it, who should produce and surrender it to the conductor; that the servants of the company might lawfully eject any one from their cars, who did not surrender his ticket to the conductor, although he had paid his fare, and procured the ticket,

*2. Under the English statute, against doing "any thing, to obstruct any engine, or carriage, using any railway, or to endanger the safety of any person, conveyed in the same," it is not necessary to allege, or prove, that the railway was constructed, or worked, under the powers of the act of parliament.[5] It is enough to show that the respondent wilfully did the act complained of, and that it was of a nature to endanger the safety of persons, upon the railway.[5] And it is no defence in such case, that the respondent did not intend to do any injury.[5] A person who throws a stone at an engine, or carriage, using a railway, may be indicted, under the latter clause of the section,[5] for doing an act to endanger the safety of any person," &c.

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and lost it. But that they would, in such case, be liable for breach of duty, as common carriers, to make good all loss, which occurred to the passenger, by detention or otherwise, which is entirely at variance with the former portion of the decision. We should conjecture, that the former part of the decision may be correctly reported, and that instead of the latter point, the court may have held, that the company are liable to refund the money, after the ticket is recovered, not having been used, or possibly, that the passenger might be entitled to pass in the cars, without surrendering his ticket, in case of loss, or mislaying the same, upon giving proper indemnity, by the deposit of the money, until the ticket should be surrendered.

[5] Reg. *v.* Bowring, 10 Jur. 211.

* CHAPTER XXX.

TAXATION.

SECTION I.

ASSESSMENTS UPON RAILWAY WORKS, AND UPON STOCK, OR SHARES.

1. *Under English statutes, company assessed for net profits, in each parish.*
2. *This may be increased, by the traffic, or by smallness of repairs, in the parish.*
3. *Depreciation of road by time, to be taken into account.*
4. *Mode of estimating yearly net profits.*
5. *Rule stated in several of the American states.*
6. *Liability to taxation on railway stock, same as other personal property.*
7. *Railways not generally held liable to taxation, as a fixture, under general laws.*
8. *Such erections, as are necessary to the use of a railway, are not taxable, separate from the road.*
9. *But erections of mere convenience, for profit, may be.*
10. *Or such as are without the limits of land allowed to be taken, compulsorily.*

§ 228. 1. The assessment of railways, in England, to the poor's rate, which is the chief parish rate there, is made upon the company, as an occupier of land, under the 43 Eliz. c. 2, which by 6 & 7 Will. 4, c. 96, is required to be assessed upon the "net annual value." And by 3 & 4 Vict. c. 89, reënacted, from time to time, the assessment is required to be "in respect of his ability, derived from the profits" of such occupancy of land, or other property. Under these statutes, it was held that a railway company was to be rated, according to the value of the land, as increased by the line of railway and buildings. And also that the company were properly assessed, for what a lessee could afford to pay for the use of the railway, as net profits, after deducting all expenses of maintaining its operation. And further, that such amount was to be distributed, amongst the assessments of the several parishes, not in proportion to the length of the railway, but the actual earnings of each parish.[1]

[1] Reg. *v.* The London & Southwestern Railway, 2 Railw. C. 629; s. c. 1 Q. B. 558. And where certain lands, had, by the Paving Act, been excepted from liability to a rate under the act, and afterwards part of the grounds, so exempted, were occupied by a railway company, for the purposes of their road, it was held

*2. And it makes no difference, that some portion of the earnings of one parish may be received, at other points. It is not what is received in each parish, but what is earned there, which may be increased by there being more traffic there, or by the yearly out-goings and expense there, being less.[2]

3. The company have a right to have the depreciation of the road, by time, taken into the account, to lessen the assessment.[3] And the cost of any particular portion of the road is not to be taken into the account, in determining the assessment, except so far as it may conduce to the net earnings, of that portion of the railway.[4]

4. By the English practice the Quarter Sessions are the final tribunal to estimate the yearly net profits of property so rated. And in making the assessment of the net profits of a railway, it was held, they proceeded correctly, in taking the gross receipts of the company, in respect of their own railway, and making the following deductions:—

1st. Interest on the capital invested in the movable stock of the company.

2d. A percentage on the same capital, for tenant's profits, and profits of trade.

3d. A percentage on the same sum, for annual depreciation of stock, beyond ordinary annual repairs.

4th. The actual annual expenses of the company.

5th. The fair annual value of stations and buildings, rated separately from the railway.

6th. An annual sum per mile, for the renewal and reproduction * of the rails, sleepers, &c. and that these were all the deductions properly to be made.[5]

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that such part was still exempt from the rate. Todd *v.* London & Southwestern Railway, 7 M. & G. 366. Where the sessions had assessed a railway, not according to its value, as used for a railway, but according to the value of the adjoining lands, which was greater, the order was quashed, notwithstanding it appeared that the railway had displaced many buildings, which had contributed largely to the rates. Reg. *v.* Manchester, South J. & A. Railway, 15 Q. B. 395, n.

2 Hodges, 687; Rex *v.* Inhabitants of Barnes, 1 B. & Ad. 113; Rex *v.* Kingswinford, 7 B. & C. 236. The assessment for the stations and buildings is a separate assessment for the net rent of such buildings.

3 Reg. *v.* London, Br. & South Coast Railway, 6 Railw. C. 440; 15 Q. B. 313; 3 Eng. L. & Eq. R. 329.

4 Reg. *v.* Mile End Old Town, 10 Q. B. 208.

5 Reg. *v.* Grand J. Railway, 4 Q. B. 18; Reg. *v.* Great Western Railway, 6

7th. But where one railway company, by contract with another company, were to have the control of the trains and fares, on the latter line, and were to pay a sum of money, which should raise their dividends, upon their capital stock, to three per cent., it was held, that the payment made by the former company should not be taken into the account, in estimating the ratable value of the latter company.[6]

8th. But a rent, or sum, in nature of rent, paid for the occupation of a railway, is not necessarily a criterion of its ratable value. The profits on a main line, derived by occupation of a branch, may be taken into account, in estimating the ratable value of the branch, and the local profits only.[7]

5. In many of the American states, railways are made liable to taxation, as a part of the realty, including their whole line of road. But this is defined in the several statutes, and the decisions will be of little force out of the state, where made. But a brief reference to some of the more prominent points is here made.

In New York, taxes are levied upon the value of the land and the erections and fixtures thereon, irrespective of the considerations, whether the road is well or ill managed, or whether it is profitable to the stockholders or otherwise.[8]

Q. B. 179; Same *v.* Same, 15 Q. B. 1085. Where a branch railway is worked in connection with the whole line, as an undistinguished part of it, the whole should be estimated together, and not the branch separately. Reg. *v.* Midland Railway, 6 Railw. C. 464–477.

6 Regina *v.* Newmarket Railway, 25 Eng. L. & Eq. R. 138.

7 Reg. *v.* The Southeastern Railway, 25 Eng. L. & Eq. R. 176. See also Hodges, 686–737, where some valuable suggestions are found, in regard to the detail of these assessments, which we have not space to repeat here.

8 Albany & Schenectady Railway *v.* Osborn, 12 Barb. 223; Albany & West Stockbridge Railway *v.* Canaan, 16 Barb. 244. Each tax district assesses that portion of the road within its jurisdiction. People *v.* Supervisors of Niagara, 4 Hill, 20. In regard to taxation of railways, it has been well said, that the only just basis for exercising it is, that it be imposed upon profits. Paine *v.* Wright & The Indianapolis & Bellefontaine Railway, 6 McLean, R. 395. See also People *v.* Mayor of Brooklyn, 6 Barb. 209.

By a statute of New York, passed in 1857, the real estate of railway corporations is assessed, "in the town or ward in which the same shall lie, in the same manner as the real estate of individuals." And assessments on the personal estate of railways shall be made, by the assessors of the "town or ward in which their principal office is situated," but the taxes thereon "shall be divided and paid,"

The rule in Illinois seems to be much the same. The railway is held liable to taxation, as real estate, situated within the county assessing the tax,[9] and a tax upon an undivided portion of a *railway, lying in different counties, including its furniture, is not legal. The personal property of the corporation is liable to taxation, if at all, at the residence of the owner, which, in such case, is considered to be the place of their principal office of business.[9]

" to the collectors of the several towns, &c. through which the road shall pass, in proportion, as near as may be, to the length of the track, in such towns, &c. as compared with the whole length."

This seems to be putting assessments upon the real estate of railway companies, very much upon the basis of the English practice, except that the distribution among the several towns, of the assessment for personal estate, is to be made, according to the length of track in each town; while in England the assessment upon real estate includes the plant, or rolling stock of the road, as a mere accessory to the profits, by which the road bed and superstructure is rated. This seems more simple and just, than to attempt a separate estimate of each, and the more recent decisions in this country certainly incline in that direction *Post*, § 235, n. 21, 22, 23, 24.

[9] Sangamon & Morgan Railway *v.* County of Morgan, 14 Illinois R. 163; Mohawk & Hudson Railway *v.* Clute, 4 Paige, 384. It has been held, that where the right to maintain actions in a county, depends upon residence, the company might maintain an action, in that county where their records were kept, and a large share of their business transacted, notwithstanding they might have another office in a different county, where the residue of their business is done, and where the clerk and treasurer reside. Androscoggin & Kennebec Railway *v.* Stevens, 28 Maine R. 434; Bristol *v.* Chicago & Aurora Railway, 15 Illinois R. 436.

In a recent case, in the Supreme Court of Vermont, Conn. & Pass. Rivers Railw. *v.* Cooper, 30 Vt. R. the question of the right of the plaintiffs to maintain an action, in the county of Windsor, (into which their road extended, but where they had no office, or place of business, except their ordinary way stations,) on the ground of residence in that county, was discussed, at very considerable length, by the counsel, and the court, and the conclusion arrived at was:—

That a railway company, for purposes of maintaining actions, or being taxed for personalty, in the place of residence, must be regarded, as having its situs at some point upon its line, (including branches,) and that this could not ordinarily be extended beyond the place of its principal business office, at the point where its chief operations, under its charter, had their centre. That this could not in any view be extended to include merely way stations; and consequently the plaintiffs cannot be regarded as having any residence in the county of Windsor. This result is maintained, in the opinion of the court, to be the only conclusion to be drawn from the decisions upon the subject; and to have the support of convenience, analogy, and general acquiescence, both in regard to legislation and judicial construction.

The same rule seems to obtain in Rhode Island.[10]

[10] Providence & Worcester Railroad *v.* Wright, 2 Rhode Island R. 459. See also Louisville & Portland Canal Company *v.* Commonwealth, 7 B. Monroe, 160.

In a late case in the Supreme Court of Vermont, (Thorpe *v.* The Rutland & Burlington Railway, 27 Vt. R. 140,) a doubt is expressed, in regard to the entire soundness of the principle of legislative exemptions of corporations from taxation. It may be sound, perhaps, within certain limits, and so far as it can be clearly shown to have formed an essential ingredient in the consideration, which induces the corporators to accept their charter, and undertake the offices thereby created. If it were apparent, that without the exemption the company would not have accepted their charter, it might with great propriety be urged, that the indispensable condition of its existence should be held inviolable, even by the legislature.

And it is possible to attach some such importance to exemptions from *special* taxation. By this we do not mean, a tax imposed upon the stock, or property, of a particular company, but upon a class of corporations, by themselves, as upon banks, or railways, which it is conceded may be taxed, as a class, to the limit of exhausting all their profits, and thus virtually, although indirectly, causing their destruction. An exemption from this kind of taxation, or in other words, a provision in the charter of a corporation, that all taxes levied upon it, shall be in common, with the same amount of property of other persons, throughout the state, would certainly be just, and ought to be held binding upon future legislatures, and could form no unreasonable abridgment of the state sovereignty.

It is this kind of exemption which the United States Supreme Court, at first, claimed, in regard to the agencies of the national government, as an indispensable quality of the paramount sovereignty, accorded to that government, within its appropriate sphere. McCulloch *v.* The State of Maryland, 4 Wheaton, 316.

Ch. J. *Marshall* says expressly, in concluding the opinion, in that case, that the limitation, there imposed upon the power of the states, to tax the Bank of the United States, "does not extend to a tax paid by the real property of the bank, in common with the other real property, within the state, nor to a tax imposed on the interest, which the citizens of Maryland may hold in this institution, in common with other property, of the same description, throughout the state."

Under this exception it was supposed, that shareholders in the United States Bank were liable to taxation by the several states, in common with other bank stock owners. But it has been since held, that the owners of United States government stock were not liable to taxation, upon that stock. Weston *v.* The City of Charleston, 2 Peters, R. 449.

The distinction, however, between a special tax, upon a corporation, its property, or even its capital, and a tax upon the income of shareholders, derived from the stock, is a broad and obvious one, and would seem to mark the limit of exemptions of the property of corporations from taxation, without undue abridgment of legislative authority, and of the essential elements of state sovereignty. But the cases already referred to show, that the right of legislative exemption has been carried further, in some cases, and such seem to be the decisions of the national tribunal, in the last resort. Gordon *v.* The Appeal Tax Court, 3 Howard, 133.

*In some of the states the capital stock of a corporation is taxable to the company, in the town where it keeps its principal business office.[11]

6. But the owners of stock in railway companies are liable to taxation upon it, without reference to any tax imposed upon the company. And upon this ground it was decided that the company were not liable to taxation upon their track, or stations, unless specially so provided by statute, because this would be *virtually double taxation.[12] The owner of stock is liable to

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It would appear to be a very obvious necessity of the state, as well as the national sovereignty, that the right to levy a tax upon income, should exist, and remain perpetual, and inviolable. Hence upon principle, it would seem, that the opinion of *Thompson*, J., in Weston *v.* The City of Charleston, in which he maintained, that the tax upon the income of the owner of United States stocks, was valid, and constitutional, and that of *Catron*, J., in State Bank of Ohio *v.* Knoop, sustained by the decisions of the state courts, then under consideration, and the opinion of *Parker*, Chief Justice, in Brewster *v.* Hough, 10 N. H. 138, maintaining the want of power, in a state legislature, to grant a perpetual exemption from taxation, was the sounder view of the law. And as we have elsewhere said, we would not be surprised to find hereafter this whole subject of the right of a state legislature, to exempt corporations, by their charter, from taxation, brought in question, or at all events, limited to exemption from special taxation. But the law, at present, is probably otherwise.

It seems, too, that, upon principle, an exemption of this character is not an essential franchise of the corporation, and is therefore necessarily temporary in its nature, as much so as the grant of a power to regulate its own police, which could confessedly at any time, be resumed by the state. Our views in regard to the distinction between the essential franchises of a corporation, and those which are merely incidental, the former of which are inviolable, even by act of legislation, and the latter merely temporary, and necessarily subject to the will of the legislature, are sufficiently explained, in the opinion, in Thorpe *v.* The Rutland & Burlington Railway. *Post*, § 232.

[11] Mohawk and Hudson Railway *v.* Clute, 4 Paige, 384. Where a question arises in which, of two or more jurisdictions a party is taxable, he will be allowed to maintain a bill of interpleader against them, to determine the question. Thompson *v.* Ebetts, 1 Hopkins, Ch. R. 272. See also Bank of Utica *v.* Utica, 4 Paige, 399.

[12] Bangor and Piscataqua Railway *v.* Harris, 21 Maine R. 533. But in Cumberland Marine Railway Co. *v.* Portland, 37 Maine R. 444, this case is said to have been decided contrary to Rev. Stat. 1838, which expressly makes "improved lands taxable," *sed quære*. And in other states it is held the state may lawfully tax both the stock and the road, as a fixture, or tax one when the other is exempted, by parity of reason. But see cases under note (13), which seem to take a different view. Illinois Central Railway *v.* County of McLean, 17 Ill. R. 291, 296; Philadelphia, Wilmington, and Balt. Railway *v.* Bayless, 2 Gill, 355.

taxation, whether the corporation be in the state of his residence, or not, and even where it is taxed in another state.[13] And where one becomes himself the lessee of the works of a company, and is liable to taxation upon its property, in the place of his residence, he is also liable to be taxed, in the same place, for the stock he owns in the same company.[14] Where a railway is required to pay into the state treasury a certain sum annually, from its "income," this is to be understood, as its net income, of that year, and where, in any year, the net income is not sufficient to pay that sum, the company are not obliged to make up the deficiency, from the excess of other years.[15]

7. Under the general laws of different states, by which real estate is made liable to taxation, railways have not generally been held liable to taxation, as a fixture, its stock being liable in the hands of the shareholders. But there are some exceptions to this practice.

8. In Pennsylvania, in Lehigh Navigation Co. *v.* Northampton County,[16] it was held, that the toll-houses and offices of a canal company, are such a necessary incident of the corporation and its functions, that they cannot be assessed, and taxed, as separate real estate. And in a later case,[17] it was held, that such property as is appurtenant, and indispensable to, the construction and operation of a railway, as water-stations and depots, and probably offices, and oil-houses, and car and engine-houses, and all such erections, as may fairly be regarded, as necessary, to the convenient *use of the road, are to be held exempt from taxation, as forming a part of the incorporeal estate of the corporation.

9. But it was also said, in this last case, that those erections,

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[13] State *v.* Branin, 3 Zabriskie, 484; Easton Bridge *v.* Northampton, 9 Barr, 415; State *v.* Bently, 3 Zabriskie, 532; State *v.* Danser, id. 552; Great Barrington *v.* Berkshire County, 16 Pick. 572. But see Gordon *v.* Baltimore, 5 Gill, 231, 236, and 12 Gill, & J. 117.

[14] Stein *v.* Mobile, 24 Alabama, 591; Providence Bank *v.* Billings, 4 Peters, U. S. R. 514; State *v.* Tunis, 3 Zabriskie, 546. In this case it is held, the shareholder is liable to taxation upon his shares, according to their fair market value, and not at the nominal par value.

[15] Opinion of the judges in the matter of the Western Railway, 5 Met. 596.

[16] 8 Watts & Serg. 334.

[17] Railroad *v.* Berks County, *et vice versa*, 6 Barr, 70; s. c. 2 Am. Railw. C. 306.

which are only indispensable to the making of profits, such as warehouses, coal-lots, coal-shutes, machine-shops, wood-yards, and what does not form part of the road, are liable to taxation.

10. In a recent case in Vermont,[18] it was held, that where the charter of a railway exempted its property perpetually from taxation, that this did not extend to lands and tenements, which the company had acquired for convenience, and which were without the limits of the six rods, which, by their charter, they were allowed to take compulsorily, and were in the occupancy of tenants, or employees, of the company.

SECTION II.

LEGISLATIVE EXEMPTION FROM TAXATION.

1. *General nature of such exemptions stated.*
2. *General exemption from taxation includes stock.*
3. *Qualifications of the general rule.*
4. *Exemption of the capital stock, includes all property of the company, necessary to its business.*
5. *Exemption, with exception, includes all modes of taxation, but that one.*
6. *Union of companies, where some are exempted from taxation and some not.*
7. *Construction of a qualified exemption from taxation.*
8. *Such exemptions declared unconstitutional.*
9. *Where railway works are taxed indirectly, they cannot be taxed directly also.*
10. *Qualified exemptions held valid, and inviolable.*
11. *Exemptions from taxation should be held temporary, where they will bear that construction.*

§ 229. 1. The grounds of exemption from taxation, in regard to property, seem to be of three kinds, more or less identical perhaps, in principle. 1st. Where property is conveyed directly by the state, upon the express condition, that it shall be forever afterwards exempt from all taxation. In this case the exemption tends directly to enhance the price of the thing, and there is a most obvious equity, in maintaining the perpetual obligation and inviolability of the condition. Of this character was the exemption claimed and sustained, in the case of The State of New Jersey *v.* Wilson,[1] and distinctly recognized in many subsequent cases, which *more properly apply to other general divisions of the subject. 2d. It is held in a considerable number of cases, in the United States Supreme Court,[2] that where a corporation is

18 Vermont Central Railway *v.* Burlington, 28 Vt. R. 193.

1 7 Cranch, 164. See also Fletcher *v.* Peck, 6 Cranch, 87.

2 3 Howard, R. 133; 16 Howard, R. 386; 16 Howard, R. 416.

chartered by the state legislature, not only its property, but its capital, in the hands of shareholders, may by an express grant be perpetually exempted from taxation. 1. When a distinct bonus or price is paid to the state, for the charter, including the exemption; and 2. Even when no such specific price is paid, the exemption may be sustained, upon the mere ground of the company assuming to perform certain public duties. This doctrine is distinctly held in Gordon *v.* The Appeal Tax Court, and in The State Bank *v.* Knoop, and in the Ohio Life Ins. Co. *v.* Debolt.[2] The cases in the several States, where this rule is recognized are numerous, but as the binding force and inviolability of this exemption depends upon the applicability of that provision in the United States Constitution, prohibiting the state legislatures, from passing any law, impairing the obligation of contracts, the only authoritative exposition of the subject must be sought in the ultimate decision of the national tribunals. For unless we adopt this view, there is of course no path open to any thing approaching uniformity of decision, upon a subject of such vital importance. We shall, therefore, only refer to such decisions of the state courts, as propose to limit, or qualify the doctrine.

2. The cases in the United States Supreme Court regard a general exemption of the property of a corporation from taxation, as exempting its stock in the hands of the stockholders.[3]

3. But some of the state courts have construed such general exemption, as not extending to property of the corporation, which was a mere convenience in the conduct of their business, but not essential.[4] And it has been held in some cases that a general exemption of a railway from taxation does not extend to the holder of their bonds.[5] And where a corporation is made liable to a specific tax whenever their net profits shall reach a certain point, and exempted from all other taxes, this is a present exemption *from all other modes of taxation, except that specified, and that only attaches, when the condition occurs.[6] A

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3 Gordon *v.* The Appeal Tax Court, 3 Howard, 133.

4 State *v.* (The Comm. of) Mansfield, 3 New Jersey, 510; Gardner *v.* State, 1 id. 557; Worcester *v.* Western Railway, 4 Met. 564; Meeting-House Society in Lowell *v.* Lowell, 1 Met. 538; Lehigh Co. *v.* Northampton, 8 W. & S. 334; Rome Railway *v.* Rome, 14 Ga. R. 275; Railway *v.* Berks Co. 6 Barr, 70.

5 State *v.* Branin, 3 Zab. 484. But see State *v.* Ross, id. 517.

6 State *v.* Minton, 3 Zab. 529.

general exemption of the property of a corporation from taxation, but making the stock liable to taxation, in the hands of stockholders, will exempt its surplus funds, and its real estate, from taxation.[7]

4. Exemption of the capital stock has been held to exempt property of the company, necessary to carry on the business.[8]

5. In State *v.* Berry,[9] it is held that where the charter of a railway was subjected, in terms, to certain specified taxation, with a general exemption "from all further or other tax, or impost," that this exempted the company perpetually from all other taxation, and this is the doctrine laid down, by the majority of the United States Supreme Court, in State Bank *v.* Knoop.[10]

6. And where a corporation, enjoying an exemption from taxation, is united with other corporations, not having such exemption, by a legislative act of consolidation; this does not extend the exemption beyond the first corporation, and the property of the other corporations, being the road of a railway, is still liable to taxation.[11]

7. And where a statute provided, that the shares of the capital stock of a certain railway should be exempt from taxation, "except that portion of the permanent and fixed works of the company, within the state of Maryland," and that in regard to that section, no greater tax should be, at any time, levied, than in proportion to the general taxes throughout the state, at the same time; it was held that such portion of the fixed works of the company, as was within the state of Maryland, remained subject to general taxation, for state and county taxes.[12]

8. In a very recent and important case, Pennsylvania Canal Commissioners *v.* The Pennsylvania Railway Company,[13] where

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7 State *v.* Tunis, 3 Zab. 546.

8 The Rome Railway *v.* Rome, 14 Ga. R. 275.

9 2 Harrison, 80; New York & Erie Railway *v.* Sabin, 26 Penn. R. 242, where the exemption is implied from the company being subjected to taxes in a specific mode.

10 16 Howard's R. 386.

11 Philadelphia & Wil. Railway *v.* The State of Maryland, 10 How. R. 376. See also Baltimore *v.* Bal. & Ohio Railway, 6 Gill, 288.

12 Philadelphia, Wilm. & Balt. Railway *v.* Bayless, 2 Gill, 355.

13 5 Law Reg. 623, decided in June, 1857. The cases chiefly relied upon by the court, in this case, as having established a similar doctrine in other states, are those in Ohio, which were reversed by the Supreme Court of the United States.

*the cases are very extensively and thoroughly examined, by *Lewis*, Ch. J., the following propositions are maintained in the decision:—

1. A state legislature, in the absence of any express constitutional authority, has no power to sell, surrender, alienate, or abridge, any of the rights of sovereignty, such as the right of taxation, so as to bind future legislatures; and any contract to that effect is void.

2. So much of the act of the legislature of Pennsylvania, authorizing the sale of the Main Line of the Public Improvements of that state, as provides, that if the Pennsylvania Railway Company shall become the purchaser, they shall pay, in addition to the purchase-money, at which the Main Line may be struck down, the sum of $1,500,000, in consideration whereof, the said railway company, and the Harrisburg Railway Company, shall be discharged by the Commonwealth "*forever*, from the payment of all tonnage taxes, and all other taxes whatever," "except for school, city, county, borough, and township taxes," is declared unconstitutional and void; and an injunction was granted to prevent the same forming part of the terms of the sale.

9. Where a railway in another state is allowed, by act of the legislature, to locate part of its road in the State of Pennsylvania, on condition of paying to the state a certain sum annually, and also a corporation tax, on so much of its capital stock, as should be equal to the cost of construction of that portion of the road, and its appurtenances, within the state; and the expense of machine shops, founderies, passenger and freight houses, which were used to carry on the business of the company, had been charged to the cost of construction, it was held they were not subject to assessment and taxation, for state and county purposes.[14]

10. In a recent case, before the Circuit Court of Ohio, it is

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They are the following: State Bank *v.* Knoop, 16 How. R. 386; Ohio Life Ins. Co. *v.* Debolt, 16 How. R. 426; s. c. 1 Ohio St. R. 563. The same principle is maintained in Bank of Toledo *v.* City of Toledo, 1 Ohio St. R. 623, and in Mechanics & Traders' Bank *v.* Debolt, id. 591; s. c. reversed in U. S. Supreme Court, in error, 18 How. R. 380. Same *v.* Thomas, id. 386; The Milon & Rut. Plank-Road Co. *v.* Husted, 3 Ohio St. R. 578; Norwalk Plank Road *v.* Same, id. 586; Dodge *v.* Woolsey, 18 How. R. 331.

[14] New York & Erie Railway *v.* Sabin, 26 Penn. R. 242.

held, that a state law, which declares, "that a bank shall pay a tax of six per cent. upon its dividends, after deducting accustomed *expenses and losses, in lieu of all taxation whatever" is a contract the obligation of which the legislature cannot impair.[15]

11. It is unquestionable, that the legislature may, in the charter of a corporation, fix the rate of taxation for the time being, and subsequently repeal the provision, and subject the company to a higher rate of taxation; and unless exclusive terms are used, in regard to a provision, limiting the rate of taxation, it will be regarded, as temporary.[16]

SECTION III.

RIGHTS OF TOWNS AND COUNTIES TO SUBSCRIBE FOR RAILWAY STOCK.

1. *Such subscriptions held valid, if authorized by legislature.*
2. *Such subscriptions, in another state or province, held valid.*
3. *Lateral railway acts in Pennsylvania constitutional.*
4, and n. 2. *Some courts and judges have dissented from the general view.*
5. *Such acts have received a very strict construction.*

n. 1. *Cases reviewed.*

§ 230. 1. It has been considered that a railway is so far in the nature of an improved highway, that the legislature may empower towns and counties to subscribe for stock in such companies, whose roads pass through such towns or counties, and even where they tend to increase the business of roads, which do pass through any portion of the territory of such towns or counties.[1]

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[15] Woolsey *v.* Dodge, 6 McLean, R. 142. This decision is based upon those of the Supreme Court of the United States upon the same subject, and that those decisions are of binding authority, upon all other tribunals in the republic.

[16] Ohio Trust Company *v.* Debolt, 16 How. U. S. R. 416; Easton Bank *v.* Commonwealth, 10 Barr, 442.

[1] Louisville & Nashville Railway *v.* Davidson Co. Ct. 1 Sneed, 637; Slack *v.* Maysville & Lexington Railway, 13 B. Monr. 1, 26; Goddin *v.* Crump, 8 Leigh, 120; Penn *v.* McWilliams, 1 Jones, 61; Shaw *v.* Dennis, 5 Gilman, 405; Cincin. Wilming. & Zanesv. Railway *v.* Comm. of Cl. County, 1 Ohio St. 77; People *v.* Mayor of Brooklyn, 4 Comst. 419; Steubenville & Indiana Railway *v.* Tr. of North Township, 1 Ohio St. 105; Sharpless *v.* The Mayor of Philadelphia, 21 Penn. 147; Moers *v.* The City of Reading, 21 Penn. R. 188; Bridgeport *v.* The Housatonic Railway, 15 Conn. 475; Stein *v.* The City of Mobile, 24 Ala. R. 591; Covington & Lexington Railway *v.* Kenton Co. Ct. 12 B. Monr. 144; Cass

And * subscriptions made by towns, or cities, without any special act of legislation, to the stock of railways, have been held valid, if confirmed by subsequent legislative sanction.[2]

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v. Dillon, 22 Ohio R. 607; Talbot *v.* Dent, 9 B. Monr. 526; Nichol *v.* Nashville, 9 Humph. 252; Ryder *v.* The Alton & Sangamon Railway, 13 Ill. R. 516; Justices of Clk. Co. Ct. *v.* P., W. & K. River Turnpike Co. 11 B. Monr. 145; New O., Op. & G. W. Railway *v.* Succession of John McDonough, 8 Louis. Ann. 341; Strickland *v.* Mississippi Railway, cited in 21 Miss. R. 209; Dubuque Co. *v.* Dubuque & Pacific Railw. cited in McMillan *v.* Lee County, 3 Clarke, 323. See Griffith *v.* Comm. of Crawd. Co. 20 Ohio, 609, where *Spalding*, J., assumes that, under the Ohio constitution, prohibiting the state from giving or loaning their credit "to, or in aid of, any individual, or association, or corporation whatever, and from becoming a joint owner or stockholder, in any company or association, in the state or elsewhere, formed for any purpose whatever," they cannot authorize a county, by a vote of the majority of its citizens, to subscribe for stock in a railway. But the question did not necessarily arise in the case, it having been decided upon other grounds. Taylor *v.* Newbern, 2 Jones, Eq. (N. C.) 141; City of St. Louis *v.* Alexander, 23 Mo. R. 483. The question was here held properly referable to the voters of the district, making the subscription, by the act of the legislature. The legality of such subscriptions seems to be recognized by two recent cases in Louisiana. V., S. & Texas Railway *v.* Parish of Ouachita, 11 Louis. Ann. R. 649; Parker *v.* Scogin, id. 629.

In a case in the Circuit Court of the United States, for the District of Indiana, before Mr. Justice *McLean*, after the most elaborate discussion upon the point of the competency of counties, by legislative permission, to make subscriptions for building railways, passing through such counties, and to issue bonds, with coupons, for the amount of such subscriptions, it seems to have been held, without hesitation, that such bonds were valid and binding upon the counties. In this case the question of the subscription was submitted to the voters of the county. 9 Am. Railw. Times, June 18, 1857. See also Cotton *v.* County Comm. 6 Florida R. 611; Slack *v.* Maysville & Lexington Railway, 13 B. Monr. 1; Cass *v.* Dillon, 2 Ohio St. R. 607; Thompson *v.* Kelly, id. 647.

[2] Bridgeport *v.* Housatonic Railway, 15 Conn. R. 475. The decisions in the several states seem all to have been in favor of the power of the legislature to build railways, at the public expense, of which there is perhaps no great question, for it seems to be a species of internal improvement, or intercommunication, which is, in a measure, indispensable to public interests, and public functions, in many ways.

The right, too, of the United States to do, or to aid in doing, the same, for purposes of conveying the mails, the army and its materiel, and for other public purposes, seems now to be almost universally conceded.

But, in regard to the power of the legislature to empower municipal corporations, to subscribe for railway stock, there has been more controversy. The dissenting opinions of some of the judges, upon this question, where the majority of the court have maintained the validity of such subscriptions, would appear to have the advantage of the argument, especially where it has been attempted, to

*2. It was held that the statute of the New York legislature, authorizing railway companies of that state to subscribe for stock in the Great Western Railway, Canada West, is constitutional.[3]

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impose a burden, upon municipal corporations for the erection of railways, beyond their territorial limits, although incidentally affecting their pecuniary interests, by way of business. The fallacy in the argument by which the leading opinions have been attempted to be maintained, if there be any, seems to consist, in assuming, that corporate interests of municipal corporations extend to every thing, affecting their general wealth and business prosperity. Whereas, in truth, we are compelled to limit such interests, at a point far short of this. Every thing which is practically indispensable to the security of life and property, or to the successful pursuit of business, and to the furtherance of public improvement and enterprise, and which is strictly within the territorial limits of the corporation, is, undoubtedly, to be fairly regarded as of municipal interest, and concern.

But, when we go beyond this, and include every improvement, and public enterprise, which centres in such municipality, there seems to be serious difficulty in fixing any just limits, to the public burden, which such corporations shall impose upon its members, by the consent of the legislature, which is, ordinarily, no sure barrier against unjust taxation, for the fostering and support of public works, in which the majority of the citizens of a district, or state, may already be embarked. These and similar considerations have with us created such distrust of the justice and legality of these municipal subscriptions, for railway stock, that, if the question were altogether new, we should entertain great doubts, and serious hesitation, in regard to the practice coming appropriately, within the range of municipal powers and duties. It seems to us, that if these public works require public patronage, it would more appropriately come from the state, than from the municipalities, which are created for limited purposes, and with no appropriate facilities, for the management of pecuniary investments in such extended enterprises. But the weight of authority is all in one direction, and it is now too late to bring the matter into serious debate, certainly, until a larger experience of the impediments attending the management of investments in railway companies, by municipal corporations. The distinction between the case of building a railway, leading into a city, which only incidentally affects the business interests of the city, and the case of building an extensive aqueduct, for the supply of water to the inhabitants of a city, or town, and for nothing else, is too obvious, to require explanation.

[3] White *v.* Syra. & Utica Railway, 14 Barb. 559. The City Council of Charleston have the power, under their charter, to subscribe to the stock of railway companies, within and without the state, and to tax the inhabitants of the city, for the purpose of paying the subscriptions. Copes *v.* Charleston, 10 Rich. (S. C.) R. 491.

The City Council of Charleston, having at different times subscribed to the stock of railway companies, within and without the state, the legislature, by an act of 1854, confirmed all such subscriptions, and declared them obligatory on the city council. Held, that the act of 1854, was constitutional; and that no proceed-

3. And the lateral railway acts in Pennsylvania, by which every county in the state is authorized to make railways, and to condemn land and other private property for the purpose, are held to be constitutional and valid,[4] which is much the same, as subscriptions to railway stock, by the counties.

4. Some of the New York District Supreme Courts have held that the constitution of the state, by fair construction, prohibited municipal corporations from making subscriptions to the stock of railways.[5] And it was held by the Supreme Court of Ohio, that * where an act of the legislature authorized the trustees of the several townships, through which the railway "may be located," to subscribe to the capital stock of the company, and the preliminary vote of the tax-payers and the subscription were made before the road was located, the subscription cannot be

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ing by *quo warranto*, in the name of the state, for the purpose of questioning the validity of such subscriptions, could afterwards be taken. Id.

[4] Harvey *v.* Thomas, 10 Watts, R. 63; Harvey *v.* Lloyd, 3 Barr, 331; Schoenberger *v.* Mulhollan, 8 Barr, 134.

[5] Clarke *v.* City of Rochester, 5 Law Reg. 289; 13 How. Pr. R. 204. The opinion of the court, in this case, by *Allen*, J., assumes grounds which tend very strongly to subvert the general right of such corporations, to make such subscriptions. But this case was reversed in the general term of the Supreme Court. 24 Barb. R. 446. It is here said by the court, that internal improvements may be constructed, by general taxation, and in case of local works, by local taxation; or the state may aid in their construction, by becoming a stockholder in private corporations, or authorize municipal corporations to become such stockholders, for that purpose. Railways are public works, and may be constructed by the state, or by corporations.

And in Grant *v.* Courter, 24 Barb. R. 232, it is decided, that an act of the legislature authorizing the towns, in the counties, through which the Albany and Susquehanna Railway is located, and in progress of construction, to borrow money, and subscribe for and purchase the stock of the company, with the view of aiding in the completion of the work, is not in contravention of any express or implied constitutional limitation of the power of the legislature, and that the act was within the general power of legislative authority in the state; that the act did not deprive any citizen of his property, or take private property for public use; that this could not be held to be the case, except where property was directly taken, and appropriated, to public use.

In Benson *v.* The Mayor of Albany, 24 Barb. R. 248, the same principle is re-asserted, in regard to an act of the legislature, authorizing the city of Albany to loan their credit to the Northern Railway.

And in Wynn *v.* Macon, 21 Ga. R. 275, the general power of municipal corporations to subscribe for railway stock, by consent of the legislature, is maintained, and also that the legislature may ratify such subscriptions, made before the act.

enforced, although the road is subsequently located through the township.[6]

5. Where the act of the legislature gave counties the power to subscribe for stock in a railway, *after*, and not *before*, the same shall have been "designated, advised, and recommended," by a grand jury, it was held, that the recommendation of the grand jury, that the county subscribe for such stock, "to an amount not exceeding $150,000," was not such a compliance with the statute, as to justify any subscription. They should define the amount more strictly.[7] And bonds of the county, issued on such a subscription, were enjoined upon a bill in equity, at the suit of the county.

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*CHAPTER XXXI.

CONSTITUTIONAL QUESTIONS.

SECTION I.

WHEN RAILWAY GRANTS ARE PARAMOUNT AND EXCLUSIVE.

1. *In the English Constitution there is no restriction upon the legislature.*
2. *Limitation in United States Constitution upon the subject.*
3. *Essential requisites to constitute an exclusive franchise, or grant.*
4. *Construction of such grant by the tribunal of last resort.*
5. *Opinion of Massachusetts Supreme Court upon the subject.*
6. *Grants of the use of navigable waters, for manufacturing, revocable.*
7. *Forfeiture for the benefit of a county may be remitted by legislature.*
8. *Where the legislature repeal the charter of a corporation. Presumptions.*
9. *Statement of an important case in Louisiana.*

§ 231. 1. VERY little is said in the English statutes, or treatises, in regard to the exclusive powers of railway corporations, it

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6 Steubenville & Ind. Railway *v.* Trustees of Jackson, 4 Law Reg. 702. This case is certainly put upon narrower grounds than would commend themselves to our sense of propriety, if the principle itself were not regarded as one of strict law.

7 Mercer County *v.* Pittsburgh & Erie Railway, 27 Penn. R. 389. Wetumpka *v.* Winter, 29 Ala. R. 651.

being assumed there, that parliament has entire control over such corporations, even to dissolve them. It would follow of course, that the legislature having the power to dissolve the corporation, at will, might impose any desired restrictions.[1]

2. But in the United States, the several state legislatures are expressly prohibited, from passing "any law impairing the obligation of contracts," which has been construed to contain a prohibition from taking away, or impairing the exercise of, any of the essential franchises of a corporation.[2] And the rule obtains *practically in Great Britain, as will appear by the constitutional history of that country. And in this country the question in regard to what is to be considered an essential franchise of a corporation, is one admitting of almost indefinite range of construction, or discretion.[3]

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[1] Co. on Litt. 196, n. *o*. 1 Thomas, Arrangement, 157; 1 Black. Com. 484; Dart. College *v*. Woodward, 4 Wheaton, R. 518. But to the credit of the English nation, this power has never been exercised, except in one, or two, extreme cases, involving essential political rights, as the suppression of the order of Templars, in the time of Edward the Second, and of the religious houses in the reign of Henry the Eighth. And it is settled law, in Great Britain, that although the sovereign may create, he cannot dissolve a corporation. The King *v*. Amery, 2 T. R. 515, 568; The King *v*. Passmore, 3 T. R. 190, 205, 206.

[2] Dart. College *v*. Woodward, 4 Wheaton, R. 518.

[3] Thorpe *v*. Rut. & Bur. Railway, 27 Vt. R. 140, where it is said: "It is admitted that the essential franchise of a private corporation is recognized, by the best authorities as private property, and cannot be taken, without compensation, even for public use. Armington *v*. Barnet, 15 Vt. R. 745; West River Bridge Company *v*. Dix, 16 Vt. R. 476; s. c. in error in the U. S. Sup. Court, 6 Howard, R. 507; 1 Bennett's Shelford, 441, and cases cited.

"All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of Dartmouth College *v*. Woodward was decided, and which every well-considered case in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railways, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. Many analagous subjects may be adduced to show the right of legislative control over matters chiefly of private concern. It was held, that a statute making the stockholders of existing banks liable for the debts of the bank was a valid law as to debts thereafter contracted, and binding, to that extent, upon all stockholders, subsequent to the passage of the law. Stanley *v*. Stanley, 26 Maine R. 191. But where a bank was chartered with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, and a statute of the state subsequently made

*3. But in this country, it is generally required, that to place the powers, granted to a corporation, above the control of the legislature, they must be either such powers, as are essential to the existence, and just operation of a corporation, of the kind in question, or else they must be expressly secured to the corporation, in its charter.[4] And where the grant to a railway, or other similar corporation, is not exclusive, in terms, thus prohibiting the legislature from creating any rival corporation, within the prescribed limits, either of time, or distance, the legislature may grant other charters, to similar corporations, essentially interfering with the utility, and profit, of the former franchise, or corporation. And even the fact, that the franchise of the former corporation is essentially destroyed, for all beneficial purposes to the grantees, is no sufficient objection to the validity of the subsequent grant, the legislature being themselves the judges, when and where, the public good requires other similar grants, from whose decision,

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it unlawful for any bank in the state to transfer, by indorsement or otherwise, any bill or note, etc., it was held the act was void, as a violation of the contract of the state with the bank in granting its charter. Planters Bank *v.* Sharp, and Baldwin *v.* Payne, 6 Howard, R. 301, 326, 327, 332; Jameson *v.* Planters and Merchants' Bank, 23 Alabama R. 168. It is true that any statute destroying the business or profits of a bank, and equally of a railway, is void. Hence a statute prohibiting banks from taking interest, or discounting bills or notes, would be void, as striking at the very foundation of the general objects and beneficial purposes of the charter. But a general statute, reducing the rate of interest, punishing usury, or prohibiting speculations in exchange or in depreciated paper, or the issuing of bills of a given denomination, or creating other banks in the same vicinity, has always been regarded as valid. And while it is conceded the legislature could not prohibit existing railways from carrying freight or passengers, it is believed that, beyond all question, it may so regulate these matters as to impose new obligations and restrictions upon these roads materially affecting their profits, as by not allowing them to run in an unsafe condition, as was held as to turnpikes. State *v.* Bosworth, 13 Vt. R. 402. But a law allowing certain classes of persons to go toll free is void. Pingry *v.* Washburn, 1 Aiken's R. 268. So, too, chartering a railway along the same route of a turnpike is no violation of its rights. White River Turnpike Co. *v.* Vermont Central Railway, 21 Vt. R. 590; Turnpike Co. *v.* Railway Co. 10 Gill & Johnson, R. 392; or chartering another railway along the same route of a former one, to whom no exclusive rights are granted in terms (Matter of Hamilton Avenue, 14 Barbour, Sup. Court R. 405); or the establishment of a free way by the side of a toll-bridge. Charles River Bridge *v.* Warren Bridge, 11 Peters, Sup. Court R. 420."

[4] Charles River Bridge *v.* Warren Bridge, 11 Peters, U. S. R. 420.

there is practically, no appeal. This rule did not obtain, without considerable opposition, but it seems now firmly established in the national jurisprudence.[5]

4. And the national tribunal of last resort has, of late, certainly, manifested a marked inclination, to construe these exclusive grants to corporations, with very considerable strictness, as to the corporations, and with large indulgence in favor of the public, so as to restrain such exclusive privileges, which are always, more or less, in derogation of public right, within the narrowest limits.[6] Hence in the last case, it was held, that a stipulation in the charter, of a railway corporation, that the state would not, within thirty years, allow any other railway to be constructed, within certain limits, the probable effect of which would be, to diminish the *number of a certain description of passengers, on the railway then chartered, was not violated, by merely chartering another railway, which might be used exclusively, to transport merchandise, and the state courts decided correctly, in refusing to enjoin the second company, from building their road, although, if put to the use of transporting passengers, it would become an infringement of the exclusive rights of the former company; inasmuch as it did not follow, either from the incorporation of the second company, or the erection of their works, that it would be attempted to employ it, in the transportation of passengers. The inviolability of such exclusive grants is maintained, in almost all the decisions of the state courts, upon this subject,[7] except when the franchise of the

[5] Charles River Bridge *v.* Warren Bridge, 11 Peters, U. S. R. 420; s. c. 7 Pick. 507.

[6] The Richmond F. & P. Railway *v.* The Louisa Railway, 13 How. 71. In this case four of the judges dissented, and Mr. Justice *Curtis* placed his dissent upon the ground, that the charter being recognized, as a contract, it was incumbent upon the court to carry into effect its very terms, one of which is, that the legislature will not allow any other railway to be constructed, which may be likely to injure the plaintiffs.

[7] Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. R. 35; Enfield Bridge *v.* Hartford & N. H. Railway, 17 Conn. 40; Washington Bridge *v.* State, 18 Conn. R. 53; Mohawk Bridge Co. *v.* Utica & Sch. Railway, 6 Paige, 554; White R. T. Co. *v.* Vermont Cent. Railway, 21 Vt. R. 590; Washington and Baltimore Turnpike Co. *v.* Balt. & Ohio Railway Co. 10 Gill & Johns. 392; Harvey *v.* Thomas, 10 Watts, 63; Harvey *v.* Lloyd, 3 Barr, 331; Shoenberger *v.* Mulhollan, 8 Barr, 134; Thompson *v.* New York & H. Railway, 3 Sand. Ch. 625.

former corporation is taken for public use, as it may be, by making compensation.[8]

5. But this subject has recently received a very elaborate discussion, in an important case, by a judge of large experience, learning, and ability, and was determined by a court, whose judgments are entitled to the highest consideration, by all the coördinate, or superior tribunals, in the country. We have therefore deemed it to be the most profitable matter which we could offer to the profession, upon this important subject.[9]

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[8] West River Bridge *v.* Dix, 6 Howard, S. C. R. 507, 529; Pierce *v.* Somersworth, 10 N. H. R. 370; 11 id. 20; Bonaparte *v.* C. & A. Railway, 1 Bald. C. C. R. 205; Tuckahoe Canal Co. *v.* T. & James River Railway, 11 Leigh, 42; Armington *v.* Barnet, 15 Vt. R. 745; West River Bridge *v.* Dix, 16 Vt. R. 446.

[9] Boston & Lowell Railway Corporation *v.* Salem & Lowell, Boston & Maine and Lowell & Lawrence Corporations, 2 Gray, R. 1.

"*Bill for an injunction against defendants for unlawfully disturbing plaintiffs in the enjoyment of their franchise.*—The case shows, that in 1830, plaintiffs' corporation was chartered to construct a railroad from Boston to Lowell, with capital stock of $500,000, and it was provided that the legislature might regulate the tolls to a certain extent, and purchase the railroad itself, after ten years. By § 12, it was provided, 'That no other railroad than the one hereby granted, shall, within thirty years from and after the passing of this act, be authorized to be made leading from Boston, or Charlestown, or Cambridge, to Lowell, or from Boston, Charlestown, or Cambridge, to any place within five miles of the northern termination of the railroad hereby authorized to be made.' The plaintiffs proceeded and built the road, and have ever since maintained it.

"Since plaintiffs' road was constructed, the three corporations, defendants, have been created, and, by permission of the legislature, have formed junctions at the towns of Tewskbury and Wilmington, so that a line of railroad communication has been established between Lowell and Boston, through Charlestown, only one and three fifths miles longer than plaintiffs', and at no point more than three miles and one third distant therefrom, having one terminus at Lowell within half a mile of the northern terminus of plaintiffs' road, and a station-house at Charlestown for passengers, and a southern terminus in Boston one half mile nearer the centre of business in Boston than the southern terminus of plaintiffs road."

Shaw, Ch. J., after determining that the court have jurisdiction, said:—

"The next question, material to be considered, is, what are the rights of the plaintiffs, under their act of incorporation?

"This was one of the earliest acts providing for the establishment of railroads in this commonwealth for the transportation of passengers and merchandise, so early, indeed, and with so little foresight of the actual accommodations as they were afterwards provided and found necessary, that it was rather regarded as an iron turnpike, upon which individuals and transportation companies were to enter

*6. It seems to be now regarded as settled by the supreme national tribunal, that grants made by a state to use the waters of

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and run with their own cars and carriages, paying a toll to the corporation for the use of the road only, and the act authorized the corporation to make suitable rules and regulations as to the form of cars, the time of running, &c. which might be found necessary to render such use of the railroad safe and beneficial. Of course neither the government nor the undertakers had any experience, and could not form an accurate or even approximate estimate of the cost of the work, or the profits to be derived from it. And it appears by the act itself, and its various additions, that the capital was increased from time to time, from $500,000 to $1,800,000. With this want of experience, and with an earnest desire on the part of the public to make an experiment of this new and extraordinary public improvement, it would be natural for the government to offer such terms as would be likely to encourage capitalists to invest their money in public improvements, and after the experience of capitalists in respect of the turnpikes and canals of the commonwealth which had been authorized by the public, but built by the application of private capital, but which as investments had proved in most cases to be ruinous, it was probably no easy matter to awaken anew the confidence of moneyed men in these enterprises.

"In construing this act of incorporation, we are to bear in mind the time and circumstances under which it was made, but more especially to take into consideration every part and clause of the act, and deduce from it the true meaning and intent of the parties. The act, like every act and charter of the same kind, is a contract between the government on the one part, and the undertakers accepting the act of incorporation on the other, and therefore what they both intended by the terms used, if we can ascertain it, forms the true construction of such contract.

"It conferred on the persons incorporated the franchise of being and acting as a corporation, and the authority to locate, construct, and finally complete a railroad at or near the city of Boston, thence to Lowell. That this was regarded as a public improvement, and intended for the benefit of the public, is manifest from the whole tenor of the act, more especially from the authority to take property on paying a compensation in the usual manner, which would otherwise be wholly unjustifiable. It is equally manifest, from the whole tenor of the act, and the nature of the subject, that the work would require a large outlay of capital.

"How, then, are the undertakers to be compensated for the work thus provided for the public at their expense? This is answered by § 5, which provides that a toll is granted for the sole benefit of such corporation, upon all passengers and property of all descriptions, which may be conveyed or transported on such road, at such rates as the company in the first instance shall fix. This is in every respect a public grant of a franchise which no one could enjoy but by the authority of the government. This grant of toll is subject to certain regulations within the power of the government, if it should become excessive.

"We are then brought to § 12, upon which the stress of the argument in the

*navigable streams, for purposes of manufactures, &c. are in their nature revocable, and that the granting of similar powers to other

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present case has seemed mainly to turn. It provides that no other railroad than the one hereby granted, shall, within thirty years, be authorized to be made leading from Boston, Charlestown, or Cambridge, to Lowell, or from Boston, Charlestown, or Cambridge, to any place within five miles of the northern terminus of the railroad hereby authorized, that is, the termination at Lowell. The question is, does this provision confer any exclusive right, interest, franchise, or benefit, on this corporation? It is found in the same act, the whole is presented at once to the consideration of the corporators, to be accepted or rejected as a whole, and this would of course constitute a consideration in their minds, in determining whether to accept or reject the charter. If it adds any thing to the value and benefit of the franchise, such enhanced value is part of the price which the public propose to pay, and which the undertakers expect to receive, as their compensation for furnishing such public improvement.

"This is a stipulation of some sort, a contract by one of the contracting parties, to and with the other; in order to put a just construction upon it, we must consider the character and relations of the contracting parties, the subject-matter of the stipulation, and its legal effect upon their respective rights.

"It was made by government, in its sovereign capacity, with subjects who were encouraged by it to advance their property for the benefit of the public. It was certainly a stipulation on the part of the government, regulating its own conduct, and putting a restraint upon its own power to authorize any other railroad to be built with a right to levy a toll, but without an authority from the government no other company or person could be authorized so to make a railroad and levy toll, and of course no other road could be lawfully made.

"It was therefore equivalent to a covenant for quiet enjoyment against its own acts and those of persons claiming under it. This is in fact all that the government could stipulate. It could not covenant for quiet enjoyment against strangers and intruders, against the unauthorized and illegal disturbance of their rights by third persons; against those, they would have their remedy in the general laws of the land.

"But it has been argued that this stipulation as it appears in the charter is a mere executory covenant or undertaking, and is not an executed contract.

"But we think it may be both, so far as it confers a present right it is executed, so far as it amounts to a stipulation that the covenantor will not disturb the enjoyment of the right granted, it may be deemed executory. So a deed conveying land, transfers on its delivery all the title and interest the grantor can confer, and is also a stipulation that the benefit granted shall not be revoked or impaired. And this is held to apply to grants of government as well as to those of individuals. Fletcher *v.* Peck, 6 Cranch, 87.

"He who has the power of conferring a right or a franchise lying solely in grant, and who stipulates for a valuable consideration, that another shall have and enjoy it undisturbed and unmolested by any act or permission of his, in effect grants such right or franchise. But more especially when such right is conferred by the community in the form of a statute, having all the forms of law

* corporations, for public purposes, is no infringement of the former grant.[10]

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and sanctioned by the government, acting in behalf of all the people, and having power to bind them by law, such right would seem to be clothed with as much solemnity, and to have the same effect and force as if it were the grant of an exclusive right in terms. We are therefore of opinion, that under this form of words, no other railroad should be authorized to be made for thirty years, the government, as far as it was in their power, intended to engage with the corporation that no other direct railroad between Boston and Lowell should be legally made, leaving them to guard themselves from unauthorized and illegal disturbance by the general laws in the course of the ordinary administration of justice. This is strengthened by the consideration that as their whole remuneration would depend upon tolls, uncertain in amount, it was intended that they should be to some extent secure against any authorized road, taking the same travel, and of course the same tolls. There is a provision in the close of this section twelve, which in our judgment adds some weight to this conclusion. This is a right reserved to the commonwealth after a certain term of years, to purchase the railroad and all the rights of the corporation, on reimbursing them the whole cost, with ten per cent. profit, and then follows this provision: 'And after such purchase, the limitation provided in this section, (that no railroad shall be authorized to be made,) shall cease and be of no effect.' From this provision it is manifest that the restriction, as it is termed, was imposed on the government, and of course upon all the subjects for the benefit of this corporation; and after the government should have succeeded to their rights by purchase, then there would be no longer any occasion to impose any restriction on the government, it might do what it would with its own, and it would be at liberty to make any other grant or not at pleasure. This carries a strong implication that until such purchase, and so long as the income from tolls would enure to the benefit of the proprietors, the exclusive right, so far as these restrictions upon other railroads to take the same travel and the same tolls make it exclusive, should stand part of the charter.

"III. But it is strongly urged, that if the legislature intended to grant such exclusive right, and the terms of the whole act taken together will bear and require that construction, and they did grant such exclusive right, and did restrain succeeding legislatures from making any grant or contract inconsistent with it, the provision itself was beyond the power of the legislature, and void.

"We readily concede that for general purposes of legislation, the legislature rightly constituted, has full power to make laws, to repeal former laws, and, of course, the last legislative act is binding, and necessarily repeals all prior acts which are repugnant.

"But in addition to the law-making power, the legislature is the representative of the whole people, with authority to control and regulate public property and

[10] Rundle *v.* Delaware & Raritan Canal Co. 14 Howard, R. 80; Shrunk *v.* Schuylkill Nav. Co. 14 S. & R. 71; Susquehanna Canal Co. *v.* Wright, 9 W. & S. 9; Monongahela Nav. Co. *v.* Coons, 6 Watts & S. 101.

*7. But a provision in the charter of a railway, that if the company do not locate their road according to the provisions of

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public rights, to grant lands and franchises, to stipulate for purchase and obtain all such property, privileges, easements, and improvements, as may be necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests. It is under this authority that lands are granted, either in fee or upon any other tenure, that the uses of navigable streams and waters are regulated, the right to build over navigable waters, to erect bridges, turnpikes, and railroads, and other similar rights and privileges are granted and justified; of the necessity and convenience of all roads and other public works and improvements, of their fitness and the best modes of providing them, the established government of the state, acting by the legislature for the time being, must necessarily judge and determine.

"They must decide whether it is best to provide for them by funds from the public treasury, or to procure individuals to advance their own funds for the purpose, to be reimbursed by tolls, and to make just and adequate provisions incident to each. Supposing ferries or bridges are obviously necessary over a long and broad river, it is equally obvious that no public convenience would require them to be built parallel and close to each other; on the contrary such erections would be an unnecessary waste of property. Would it not be for the legislature to decide within what stated and fixed distance from each other convenience would require them? If they were erected by funds drawn directly from the state, the legislature would plainly have the power to determine such distances, and provide that no one should be built within the distances thus fixed. May they not with a due regard to the public exigencies and public interests, do the same thing when such public works are erected by individuals at the instance and procurement of the government, for public use? Were it otherwise, and were all such grants and stipulations repealable by a subsequent legislature, because they are in the form of laws, then the unlimited power of the legislature to alter and change the laws, sometimes called rather extravagantly, the omnipotence of parliament, would be a source of weakness and not of strength.

"In making such grants and stipulations, no doubt great caution and foresight are requisite on the part of the legislature, a just estimate of the public benefit to be procured, and the cost at which it is to be obtained, and as great changes in the state of things may take place in the progress of time, a great increase of travel, for instance on a given line, which changes cannot be specifically foreseen, it is the part of wisdom to provide for this, either by limitation of time, reservation of a power to reduce tolls, should they so increase at the rates first fixed as to become excessive, or of a right to repurchase the franchise upon equitable terms, so that the contract shall not only be just and equal, in the outset, but within reasonable limits, continue to be so. In the charter of the Boston and Lowell Railroad Corporation, the government reserved the right both to regulate the tolls and purchase the franchise, upon terms fixed, and making part of the contract. When such a contract has been made on considerations of an equivalent public benefit, and when the grantees have advanced their money to the public upon the faith of it, the state is bound by the plain principles of justice

the *act, they shall forfeit one million of dollars to the state, for the benefit of a particular county, though assented to by the

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faithfully to respect all grants and rights thus created and vested by the contract. Such a power of regulating public rights is everywhere recognized as one distinguishable from that of legislation, a power incident and necessary to all well-regulated governments, and when rightly exercised, is within the constitutional power of the legislature, and binding upon the government and people. The court are of opinion that these principles are well established by authorities. Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; Livingston *v.* Van Ingen, 9 Johns. 507.

"In the case of Charles River Bridge *v.* Warren Bridge, both in this court and in the Supreme Court of the United States, it was not doubted that a state would be bound by a grant of an exclusive right to a bridge or ferry, made in terms by the legislature, on the contrary the validity of such grant was implied. The controversy turned on the question, whether by the simple grant of a toll-bridge or ferry, from one terminus to another, any exclusive grant could be implied to take toll for that line of travel, so as to bar the legislature from granting a right to build a bridge to and from other termini on the same line of travel. 7 Pick. 344; 11 Peters, 420.

"In Fletcher *v.* Peck, 6 Cranch, 135, the court say, 'Where a law is in its nature a contract, where absolute rights have been vested under that contract, a repeal of the law cannot divest those rights.' So any law granting privileges to others repugnant to those previously granted, which if available would be a repeal by implication is obnoxious to the same objection. That which cannot be repealed in express terms, cannot be repealed by implication, by the enactment of laws repugnant to the provisions of the former act. The same defect of power which invalidates the one, has the same effect upon the other.

"IV. But it is earnestly insisted that the grants to the defendants' corporations do not warrant and justify them in setting up the line of transportation by railroad, by the union of the several sections of their respective railroads, and that it may be regarded as lawfully done under the right of the government to appropriate private property for public use.

"It is fully conceded that the right of eminent domain, the right of the sovereign exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must judge, is a right incident to every government and is often essential to its safety.

"And property is *nomen generalissimum* and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments.

"Even the term 'taking' which has sometimes been relied upon as implying something tangible or corporate, is not used in the Massachusetts bill of rights, but the provision is this: 'Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Art. 10. Here again the term 'appropriate' is of the largest import, and embraces every mode by which property may

company, *does not constitute a case of contract, but one of

be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated.

"It was held in the Supreme Court of the United States, that a franchise to build and maintain a toll-bridge might be so appropriated, and that the right of an incorporated company to maintain such a bridge under a charter from a state, might, under a right of eminent domain, be taken for a highway. West River Bridge *v.* Dix, 6 How. 507.

"The same point was afterwards decided in the same court in the case of a railroad. Richmond, &c. Railroad *v.* Louisa Railroad, 13 Howard, 83. Such appropriation is not regarded as impairing the right of property or the obligation of any contract, on the contrary it freely admits such right, and in all just governments provision is made for an adequate compensation which recognizes the owner's right.

"Nor does it appear to us to make any difference whether the land or any other right or interest thus appropriated, be derived directly from the government or be acquired otherwise, for the reason already stated, that it does not revoke the grant or impair or annul the contract, but recognizes and admits the validity of both. If for instance a government, through its authorized agent, had contracted to convey land to an individual, and afterwards, and before the title passed, it should be necessary to appropriate such land to public uses, such taking would not impair the obligation of the contract, the individual would have the same right to compensation for the loss of his equitable title to the land as he would have had for the land itself, if the title to it had passed. If, therefore, in the great advancement of public improvements, in the great changes which take place in the number of inhabitants, in the number of passengers and quantity of property to be transported, or in great and manifest improvements in the mode of travel and locomotion, it becomes necessary to appropriate in whole or in part a franchise previously granted, the existence of which is recognized and admitted, we cannot doubt that it would be competent for the legislature in clear and express terms to authorize the appropriation of such franchise making adequate compensation for the same.

"But we cannot perceive in the acts of incorporation of the three defendant corporations or in any of the acts in addition thereto, any act of the government taking or appropriating any of the rights, franchises, or privileges of the plaintiffs' corporation, under the right of eminent domain. The characteristics of such an appropriation are known and well understood. It must appear that the government intend to exercise this high sovereign right by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent.

"It must also appear by the act that they recognize the right of private property and mean to respect it, and under our constitution the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make compensation, the act is simply void, no right of taking as against the owner is conferred, and he

penalty, subject, as to its enforcement, to the will and pleasure of the legislature.[11]

*8. Where the legislature reserve the right to repeal the charter of a corporation, if the franchises should be abused or misused, and the legislature exercise the power to repeal, it will be presumed to have been exercised properly, and the act held constitutional, unless the company clearly show, that their franchises had not been abused, or misused.[12] If the company accept a regrant of the railway, with enlarged powers, it is thereby estopped to deny the validity of the repealing act.[12] The pendency of judicial proceedings against the company, does not suspend the exercise of the repealing power by the legislature.[12] Nor can it alter the nature of the contract growing out of the charter.[12]

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has the same rights and remedies against a party acting under such authority, as if it had not existed.

"In general, therefore, where any act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it, for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those affected."

It was therefore *held*, that the exclusive right for thirty years granted the plaintiffs by their charter is subject, like other property, to be appropriated for public use, on compensation therefor, whenever the public exigencies require it, in the opinion of the legislature.

In conclusion the court intimate that by express grant the legislature, by the exercise of the right of eminent domain, might perhaps have legally authorized defendants to construct and maintain a railroad from Lowell to Boston, but that inasmuch as no express grant to that effect has been made, it was held that they had no right to establish, by means of junctions with each other, a continuous line of transportation by railway from Lowell to Boston, and that such a connection is making a railway within the meaning of plaintiffs' charter, and is such an infringement as to be a nuisance to plaintiffs' rights, for which they are entitled to a remedy. And an injunction was granted.

[11] State *v.* Baltimore & Ohio Railway, 12 Gill & Johnson, 399. It is said in this case, that a contract made by the state, for the benefit of one of its counties, is not within the purview of that provision of the United States constitution, which prohibits the states from passing any law impairing the obligation of contracts, so as to hinder the state from releasing the contract, or discontinuing an action brought for its enforcement, in the name of the state.

In this case, in error in the United States Supreme Court, 3 Howard, 534, it is held, that this was a penalty, imposed upon the company, as a punishment for disobeying the law, and the legislature had the right to remit it.

[12] Erie & Northeast Railway *v.* Casey, 26 Penn. R. 287; *post*, § 254.

9. In a recent case in Louisiana,[13] where the plaintiffs' com-

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[13] Pontchartrain Railway *v.* New Orleans & Car. & Lake P. Railway, 11 Louis. Ann. Rep. 253. The court, in their opinion, profess to base themselves upon the case of the Boston & Lowell Railway *v.* Salem & Lowell Railway, 2 Gray, 1.

The rule of decision in regard to the constitutionality of the enactments of the state legislatures, and indeed of the national legislature, is so familiar to the profession, as scarcely to justify its repetition. Such acts are not ordinarily declared unconstitutional, unless for some obvious conflict with the very terms of the constitution itself, or some manifest violation of the acknowledged principles of legislative authority. It will never be done, upon the basis of some undefined theory of the wisdom or justice of the enactment, or of the class of enactments, to which it belongs. See, upon this subject, Calder *v.* Bull, 3 Dallas, 386; Satterlee *v.* Matthewson, 2 Pet. U. S. R. 380; Sharpless *v.* Mayor of Philadelphia, 21 Penn. St. R. 147.

In the Supreme Court of Wisconsin, in Lumsden *v.* City of Milwaukee, 6 Law Reg. 157, it was recently decided, that, as by the 11th article of the constitution of Wisconsin, it is provided that "no municipal corporation shall take private property for public uses, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury;" that where the charter of the city of Milwaukee authorized the judge of the circuit or county court of Milwaukee, where land is proposed to be taken for public use, to appoint twelve jurors to view the ground, determine the necessity of the taking, and assess the damages therefor; but did not in express terms require that the jury should be sworn before entering upon their duties, or provide any mode for swearing them: that the act was unconstitutional, and the proceedings under it void, though the jury may have been in fact sworn.

It seems to us, that if this case is correctly reported, it presents a remarkable departure, from the usual rule of construction, in regard to constitutional provisions. There seems here to have been a studious effort, by construction, to raise a conflict between the statute and the constitution; while the ordinary rule of construction, in such cases, undoubtedly is, to avoid such conflict, when it can fairly be done.

It would seem, that not only the duty of swearing the jury should have been implied, from the due course of such proceedings, but that even if the act had provided, in terms, that the jury should not be sworn, it was still so much mere matter of form, that it ought not to have been held a fatal conflict, between the law and the constitution, there being no express provision in the constitution, that the jury should be sworn.

In a recent case in Tennessee, Ferguson *v.* The Miners & Manufacturers' Bank, 3 Sneed, 609, it was attempted to escape from the force of an act of the legislature, upon the ground, that its passage was obtained, by imposition and fraud, without the majority of the legislature being made aware of the extent of the bill, and that this was done, by design, through the instrumentality of certain members of the legislature. The court declined to recognize the validity of such grounds of impeachment of the acts of the legislature. And the same view of the law seems to be maintained, by *Marshall*, Ch. J., in Fletcher *v.* Peck, 6 Cranch, 87.

pany * were incorporated in 1830, with the exclusive privilege of constructing and using a railway, leading to and from the city of New Orleans, and to and from Lake Pontchartrain; and in 1833 the New Orleans & Carrollton Railway was incorporated for the construction of a railway from New Orleans to Carrollton; and in 1840 the Jefferson & Lake Pontchartrain Railway was incorporated for the construction of a railway from Carrollton to Lake Pontchartrain; and the two last-named companies entered into an arrangement, by which "through" trains were run from New Orleans to the Lake, the plaintiffs asked for an injunction against the defendants; it was held, that the grant of another railway from New Orleans to Lake Pontchartrain, would have been an infringement of the privileges granted to the plaintiffs, by their act of incorporation, and that the legislature could no more grant the power to two, or more, companies, than it could to one.

It is further said, that if the object of the two companies was, in good faith to accommodate different lines of travel and trade, and not to engross that which would naturally pass over the plaintiffs' road, it would be lawful, although incidentally it might sometimes divert travel, or traffic, from plaintiffs' road. But if the union of the two roads was made, for the purpose of transporting freight and passengers, to and from the prohibited points, it could not be vindicated.

It is further said, that although defendants' acts of incorporation were not unconstitutional, in themselves, the moment the roads are connected, so as to form a continuous line of railway, between the two prohibited points, they become so, as far as it concerns the direct travel, between the two points, as much as a single act of incorporation, direct from one point to the other would have been. This seems an exceedingly sensible view of the subject, and one which cannot fail to commend itself to practical men.

*SECTION II.

POWER OF THE LEGISLATURE TO IMPOSE RESTRICTIONS UPON EXISTING CORPORATIONS.

1. *Are subject to legislative control in regard to police.*
2, n. 1. *Opinion of court in a case, as to railways.*
3. *Important early case in Maryland.*
4. *Extent of a reserved power to repeal charters of corporations.*
5. *Where the charter is expressly exempted from legislative control.*
6. *Effect of public patronage in regard to legislative control.*

§ 232. 1. The power of the legislature to impose new burdens, restrictions, or limitations, upon existing corporations, is one of some difficulty. There are confessedly certain essential franchises of such corporations, which are not subject to legislative control; and at the same time it cannot be doubted, that these artificial beings, or persons, the creations of the law, are equally subject to legislative control, and in the same particulars precisely, as natural persons. Railways; so far as the regulation of their own police, affecting the public safety, both as to life and property; and also the general police power of the state, as to their unreasonable disturbance of, and interference with, other rights, either by noise of their engines, in places of public concourse, as the streets of a city; or damage to property, either in public streets, and highways, or escaping from the adjoining fields; there can be no question whatever, are subject to the right of legislative control.

2. And this right extends not only to the matters enumerated, but to an infinite variety of other matters, coming into the same general description, of the public police, and the police of the railways; of the importance, or necessity, of which, the legislature must be the judge.[1]

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[1] Boston, Concord, & Montreal Railway *v.* State, 32 N. H. R. 215, where it is held, that the legislature may subject existing railway companies to indictment, for negligence, causing the death of any person. In Thorpe *v.* Rutland & Burlington Railway, 27 Vt. R. 140, the subject is very extensively examined. "The present case involves the question of the right of the legislature to require existing railways to respond in damages for all cattle killed, or injured, by their trains, until they erect suitable cattle-guards, at farm-crossings. No question could be made where such a requisition was contained in the charter of the corporation,

3. * There is an early case in Maryland,[2] where the legislature, by special statute, enabled the defendants to issue bonds for the

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or in the general laws of the state at the date of the charter. But where neither is the case, it is claimed that it is incompetent for the legislature to impose such an obligation by statute, subsequent to the date of the charter.

"It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the constitution of the United States, or of the particular state in question. I am not aware that the constitution of this state contains any restriction upon the legislature in regard to corporations, unless it be that where 'any person's property is taken for the use of the public, the owner ought to receive an equivalent in money;' or that there is any such restriction in the United States constitution, except that prohibiting the states from 'passing any law impairing the obligation of contracts.'

"It is a conceded point, upon all hands, that the parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters.

"This extent of power is recognized in the case of Dartmouth College *v.* Woodward, 4 Wheat. R. 518, and the leading authorities are there referred to. Any requisite amount of authority, giving this unlimited power over corporations to the British parliament, may readily be found. And if, as we have shown, the several state legislatures have the same extent of legislative power, with the limitations named, the inviolability of these artificial bodies rests upon the same basis in the American states with that of natural persons. And there are no doubt many of the rights, powers, and functions of natural persons which do not come within legislative control. Such, for instance, as are purely and exclusively of private concern, and in which the body politic, as such, have no special interest.

"II. It being assumed, then, that the legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the general range of legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation, it becomes of primary importance to determine the extent to which the charter of a corporation may fairly be regarded as a contract within the meaning of the United States constitution.

"Upon this subject the decisions of the United States Supreme Court must be regarded as of paramount authority. And the case of Dartmouth College *v.*

[2] McCullogh *v.* A. & E. Railway, 4 Gill, 58.

*payment of their debts, providing that the interest should be paid out of a certain fund, designated in the act for that pur-

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Woodward, being so much upon the very point now under consideration, and the leading case, and authoritative exposition of the court of last resort upon that subject, must be considered as the common starting-point, the point of divergence, so to speak, of all the contrariety of opinion in regard to it.

" Mr. Chief Justice *Marshall* there says : ' A corporation is an artificial being—the mere creature of the law—it possesses only those properties which the charter of its creation confers upon it, either *expressly* or as *incidental to its very existence.*' The decision throughout treats this as the fundamental idea, the pivot upon which the case turns. The charter of a corporation is thus regarded as a contract, inasmuch as it is an implied undertaking on the part of the state, that the corporation, as such, and for the purposes therein named or implied, shall enjoy the powers and franchises by its charter conferred. And any statute essentially modifying these corporate franchises is there regarded as a violation of the charter. But when we come to inquire what is meant by the franchises of a corporation, the principal difficulty arises. Certain things, it is agreed, are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity, when the grant is unlimited ; the power to sue and to be sued ; to have a common seal and to contract ; and in the case of a railway, to have a common stock, to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things, as incident to the beneficial use of these franchises, are necessarily implied. But there is a wide field of debatable ground outside of all these. It is conceded that the powers expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporation, are inviolable. The Supreme Court of Ohio, in Mechanics & Traders' Bank *v.* Debolt, 1 Ohio St. R. 591, have even denied this, and in argument assume the right of the legislature to repeal the charter of banking corporations. So also in Toledo Bank *v.* Bond, id. 622. But these cases involve only the right of the legislature to grant away, permanently, for a consideration, the right of taxation, which seems to me not to involve the general question.

" But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to every thing materially affecting their interests, and where there is no express reservation in their charters. It was upon this ground that a perpetual exemption from taxation was claimed in Providence Bank *v.* Billings, 4 Pet. Sup. Ct. R. 514, their charter being general, and no power of taxation reserved to the state. The argument was, that the right to tax either their property or stock was not only an abridgment of the beneficial use of the franchise, but if it existed, was capable of being so exercised as virtually to destroy it. This was certainly plausible, and the court do not deny the liability to so exercise the power of taxation as to absorb the entire profits of the institution. But still they deny the exemption claimed. Chief Justice *Marshall* there says : ' The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common

pose, the *principal being irredeemable, for thirty years, and it was provided, that the amount of A's claim should be deter-

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to individuals, do not flow necessarily from the charter, *but must be expressed in it, or they do not exist.*'

"This is sufficiently explicit, and upon examination will be found, I think, to have placed the matter upon its true basis. In reason, it would seem no fault could be found with the rule here laid down by the great expounder of American constitutional law. As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground. And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.

"To apply this rule to the present case, it must be conceded that all which goes to the constitution of the corporation and its beneficial operation, is granted by the legislature, and cannot be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States constitution. And if we suppose the legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do (Moor *v.* Veasie, 32 Maine R. 343; s. c in error in the Sup. Ct. U. S. 4 Pet. R. 568,) it would scarcely be supposed that they thereby parted with any general legislative control over such person, or the business secured to him. Such a supposition, when applied to a single natural person, sounds almost absurd. But it must, in fact, be the same thing when applied to a corporation, however extensive. In either case, the privilege of operating the road, and taking tolls, or fare and freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would, no doubt, be void. But beyond that the entire power of legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation in consideration of a share of the profits, or a bonus, or the public duties assumed. And it has been questioned how far one legislature could, in this manner, abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. Brewster *v.* Hough, 10 N. H. R. 138; Mechanics and Traders' Bank *v.* Debolt, 1 Ohio St. R. 591; Toledo Bank *v.* Bond, id. 622. It seems to me there is some ground to question the right of the legislature to extinguish, by one act, this essential right of sovereignty. I would not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. State of New Jersey *v.* Wilson, 7 Cranch, 164; reaffirmed in Gordon *v.* Appeal Tax Court, 3 How. R. 133. But all the decisions in the United States Supreme Court, allowing the legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and in the case of corporations, contemporaneous with the creation of the franchise. Richmond Railway Co. *v.* The Louisa Railway Co. 13 How. R. 71. Similar decisions in regard to the right of the legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the state, have been made by this court, Herrick *v.* Randolph, 13 Vt. R. 525, and in some of the other states, Landon *v.* Litchfield, 11 Conn. R. 251, and cases cited; O'Don-

mined by B, and it was *held that it was not competent for the legislature, to provide, by subsequent statute, for referring A's

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nell *v.* Bayley, 24 Miss. R. 386. But these cases do not affect to justify even this express exemption from taxation being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the state received or stipulated for a consideration.

"But in the present case the question arises upon the statute of 1850, requiring all railways in the state to make and maintain cattle-guards at farm-crossings, and until they do so, making them liable for damage done to cattle by their engines, by reason of defect of fences or cattle-guards. The defendants' charter required them to fence their road, but no express provision is made in regard to cattle-guards. There is no pretence of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the act of incorporation, unless every thing is implied by grant, which is not expressly inhibited, whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted. In addition to the cases already cited, we may here refer to the language of the opinion of *Grier*, Justice, in Richmond Railway Co. *v.* The Louisa Railway Co. 13 Howard, R. 71, citing from the former decisions of the court, with approbation, 'that public grants are to be construed strictly, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is clearly given by the act.' This being the definitive determination of the court of last resort, upon this subject, in so recent a case, should be regarded as final, if there be any such thing anywhere. And the language of *Taney*, Ch. J., in Charles River Bridge *v.* Warren Bridge, 11 Peters, 548, is still more specific, and, in my judgment, eminently just and conservative: 'The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to privileged corporations.' The conclusion of this learned judge and eminent jurist is, that no claim in any way abridging the most unlimited exercise of the legislative power over persons, natural or artificial, can be successfully asserted, except upon the basis of an express grant, in terms, or by necessary implication.

"But upon the principle contended for in Providence Bank *v.* Billings & Pitman, 4 Peters, Sup. Ct. R. 514, and sometimes attempted to be maintained in favor of other corporations, most of the railways in this state would be quite beyond the control of the legislature, as well as to their own police, as that of the state generally. For in very few of their charters are these matters defined, or the control of them reserved to the legislature. Many of the charters do not require the roads to be fenced. But in Quimby *v.* The Vermont Central Railroad Co. 23 Vt. R. 387, it was considered that the corporation were bound, as a part of the compensation to land-owners, either to build fences or pay for them. The same was held also in Morss *v.* Boston and Maine Railway, 2 Cush. R. 536. Any other construction will enable railways to take land without adequate com-

claim to other arbitrators, *than the one named in the first act, and making it a charge on the same fund, without the consent of the other creditors.

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pensation, which is in violation of the state constitution, and would make the charter void to that extent. So, too, in regard to farm-crossings, the charters of many roads are silent. And it has been held, that the provision for restoring private ways does not apply to farm-crossings. But the railways, without exception, built farm-crossings, regarding them as an economical mode of reducing land damages, and they are now bound to maintain them, however the case might have been if none had been stipulated for, and the damages assessed accordingly. Manning *v.* Eastern Counties Railway Co. 12 M. & W. 237. So, too, many of the charters are silent as to cattle-guards, at road-crossings, but the roads generally acquiesced in their necessity, both for the security of property and persons upon the railway, and of cattle in the highway. For it has been held that this provision is for the protection of all cattle in the highway. Fawcett *v.* The York and North Midland Railway Co. 2 Law & Eq. R. 289; Trow *v.* Vermont Central Railway Co. 24 Vt. R. 487. Thus, making a distinction in regard to the extent of the liability of railways for damages arising through defect of fences, and farm-crossings, and cattle-guards, at those points, and those which arise from defect of fences and cattle-guards at road-crossings, the former being only for the protection of cattle, rightfully in the adjoining fields, as was held in Jackson *v.* Rut. & Bur. Railway Co. 25 Vt. R. 150, and the other, for the protection of all cattle in the highway, unless perhaps, in some excepted cases, amounting to gross negligence in the owners. And there can be no doubt of the perfect right of the legislature to make the same distinction in regard to the extent of the liability of railways, in the act of 1850, if such was their purpose, which thus becomes a matter of construction.

"But the present case resolves itself into the narrow question of the right of the legislature, by general statute, to require all railways, whether now in operation or hereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road-crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. It might be contended that cattle-guards are a necessary part of the fence at all crossings, but that has been questioned, and we think the matter should be decided upon the general ground. It was supposed that the question was determined by this court, in Nelson *v.* Vermont and Canada Railway, 26 Vt. R. 717. The general views of the court are there stated as clearly as it could now be done, but as the general question is of vast importance, both to the roads and the public, and has been urged upon our consideration, we have examined it very much in detail.

"We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states, and which is, by the fifth article of the bill of rights of this state, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore, be

*4. Under the usual legislative reservation, of the power to alter, modify, or repeal the charter of a railway company, it has

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violated so as to deprive the legislature of the power, even by express grant to any mere private or public corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railways to be carried into effect by their by-laws and other regulations, it is of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of if they would.

"This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railways are concerned, this police power, which resides primarily and ultimately in the legislature, is twofold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railways in the state to establish and maintain the same kind of police which is now observed upon some of the important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railways to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railway. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

"There would be no end of illustrations upon this subject, which, in the detail, are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precautions by way of safety beams, in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. Hegeman *v.* Western Railway Co. 16 Barbour, S. C. R. 353.

"2. There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure

been *considered, that the legislature cannot impose pecuniary burdens upon the company of a character different from any

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the general comfort, health, and prosperity of the state, of the perfect right, in the legislature, to do which, no question ever was, or upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to virtual destruction by the legislature; and 2. That it is an attempt to control the obligation of one person to another, in matters of merely private concern.

"The first point has been already somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use. Armington *v.* Barnet, 15 Vt. R. 745; West River Bridge Co. *v.* Dix, 16 Vt. R. 446; s. c. in error in the United States Sup. Court, 6 Howard, R. 507; 1 Shelford, (Bennett's ed.) 441, and cases cited.

"The legislature may, no doubt, prohibit railways from carrying freight which is regarded as detrimental to public health or morals, or the public safety generally, or they might probably be made liable as insurers of the lives and limbs of passengers as they virtually are of freight. The late statute, giving relatives the right to recover damages where a passenger is killed, has wrought a very important change in the liability of railways, ten times as much, probably, as the one now under consideration ever could do. And I never knew the right of the legislature to impose the liability to be brought in question.

"But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder-mills to be built remote from the villages or highways, or to be separated from the adjoining lands by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder-mill in the state, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the state legislature have erected a corporation for manufacturing powder at a given point, at the time remote from inhabitants, if in process of time dwellings approach the locality, so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed, or secured from doing harm, at the sole expense of such corporation. This very point is, in effect, decided in regard to Trinity Church Cemetery, which is a royal grant for interment, securing fees to the proprietors, in the case of Coates *v.* The City of New York, 7 Cowen, R. 604; and in regard to The Presbyterian Brick Church Cemetery in their case *v.* The City of New York, 5 Cowen, R. 538.

others in the *charter, as requiring them to cause a proposed new street, or highway, to be taken across their track, and to cause

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"So, too, a statute requiring division fences between adjoining land proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons and equally corporations. But a statute requiring land-owners to build *all their fences* of a given quality or height would, no doubt, be invalid, as an unwarrantable interference with matters of exclusively private concern. But the farm-crossings upon a railway are by no means of this character. They are division fences between adjoining occupants, to all intents. In addition to this they are the safeguards which one person, in the exercise of a dangerous business, is required to maintain in order to prevent the liability to injure his neighbor. This is a control by legislative action coming strictly within the obligation of the maxim, *Sic utere tuo*, and which has always been exercised in this manner in all free states, in regard to those whose business is dangerous and destructive to other persons, property, or business. Slaughter-houses, powder mills, or houses for keeping powder, unhealthy manufactories, the keeping of wild animals, and even domestic animals, dangerous to persons or property, have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied.

"I do not now perceive any just ground to question the right of the legislature to make railways liable for all cattle killed by their trains. It might be unjust or unreasonable, but none the less competent. Girtman *v.* The Central Railroad, 1 Kelley, (Georgia) R. 173, is sometimes quoted as having held a different doctrine, but no such point is to be found in the case. The British Parliament, for centuries, and most of the American legislatures, have made the protection of the lives of domestic animals the subject of penal enactment. It would be wonderful if they could not do the same as to railways, or if they could not punish the killing, by requiring them to compensate the owner, or, as in the present case, to do it until they used certain precautions in running their trains, to wit; maintained cattle-guards at road and farm-crossings.

"There are some few cases in the American courts bearing more directly upon the very point before us. In Suydam *v.* Moore, 8 Barbour, Sup. Ct. R. 358, the very same point is decided against the railway. *Willard*, J., compares the requirement to the law of the road, the passing of canal boats, and keeping lights at a given elevation in steamboats, and says it comes clearly within the maxim, *Sic utere tuo;* and in Waldron *v.* The Rensselaer & Saratoga Railway, id. 390, the same point is decided, and the same judge says the requirements of the new act, which is identical with our statute of 1850, as applied to existing railways, 'are not inconsistent with their charter, and are, in our judgment, such as the legislature had the right to make.' They were designed for the public safety, as well as the protection of property. In Milliman *v.* The Oswego & Syracuse Railway, 10

the necessary *excavations, embankments, and other work to be done, at their own expense.[4]

Barb. 87, the ground is assumed that the new law was not intended to apply to existing roads. And no doubt is here intimated of the right of the legislature to impose similar regulations upon existing railways. The New York Revised Statutes subject all corporate charters to the control of the legislature, but it has been there considered, that this reservation does not extend to matters of this kind, but that the right depends upon general legislative authority. The case of The Galena & Chicago Union Railway *v.* Loomis, 13 Illinois R. 548, decides the point, that the legislature may pass a law, requiring all railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade. The court say, 'The legislature has the power, by general laws, from time to time, as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with, or impairs the powers conferred on, the defendant in their act of incorporation.' All farm-crossings in England are required to be above or below grade, so as not to endanger passengers upon the road, and so of all road-crossings there, unless protected by gates. I could entertain no doubt of the right of the legislature to require the same here as to all railways, or even to subject their operations to the control of a board of commissioners, as has been done in some states. In Benson *v.* New York City, 10 Barbour, Sup. Ct. R. 223, it was held, that a ferry, the grant to which was held under the authority of the state, but from the city of New York, and which was a private corporation, as to the stock, might be required by the legislature to conform to such regulations, restrictions, and precautions as it deemed necessary for the public benefit and security. The opinion of *Woodbury*, J., in East Hartford *v.* Hartford Bridge Co. 10 Howard, R. 511, assumes similar grounds, although that case was somewhat different. The case of Swan *v.* Williams, 2 Michigan R. 427, denies that railways are private corporations. But that proposition is scarcely maintainable so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be. The language of *Marshall*, Ch. J., in Dartmouth College *v.* Woodward, 4 Wheaton, 518, 629, seems pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts: 'That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted.' And equally pertinent is the commentary of Parsons on Contracts, vol. 2, 511, upon the provision of the United States Constitution in relation to the obligation of contracts. 'We may say that it is not intended to apply to public property, to the discharge of public duties, to the possession or exercise of public rights, nor to any changes or qualifications in any of these, which the legislature of a state may at any time deem expedient.'

[4] Miller *v.* New York and Erie Railway, 21 Barb. 513.

*5. And where the charter of a railway company expressly exempts it from legislative control, the legislature may nevertheless

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"We conclude, then, that the authority of the legislature to make the requirement of existing railways, may be vindicated, because it comes fairly within the police of the state; 2. Because it regards the division fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons."

"NOTE.—There are some analogous subjects where legislative control has been sustained by the courts, which may properly be here alluded to. The expense of side-walks and curb-stones in cities and towns has been imposed upon adjacent lots, chiefly for general comfort and convenience. Paxson *v.* Swett, 1 Green, R. 196; City of Lowell *v.* Hadley, 8 Met. 180. Unlicensed persons not allowed to remove house-dirt and offal from the streets. Vandine's case, 6 Pick. R. 187. Prohibiting persons, selling produce not raised upon their own farms, from occupying certain stands in the market. Nightingale's case, 11 Pick. 168. See also Buffalo *v.* Webster, 10 Wend. 99; Bush *v.* Seabury, 8 Johns. 419. Prohibiting the driving or riding horses faster than a walk in certain streets. Commonwealth *v.* Worcester, 3 Pick. 462. Prohibiting bowling alleys, Tanner *v.* The Trustees of the City of Albion, 5 Hill, N. Y. R. 121, or the exhibition of stud-horses in public places. Nolin *v.* Mayor of Franklin, 4 Yerger, R. 163. The same may be said of all statutes regulating the mode of driving upon the highway or upon bridges, the validity of which has been long acquiesced in.

"The destruction of private property in cities and towns, to prevent the spread of conflagrations, is an extreme application of the rule, compelling the subserviency of private rights to public security, in cases of imperious necessity. But even this has been fully sustained, after the severest scrutiny. Hale *v.* Lawrence, and other cases upon the same subject. 1 Zabriskie, N. J. R. 714; 3 Zabriskie, 9; id. 590, and cases there referred to from the New York Reports. There is, in short, no end to these illustrations, when we look critically into the police of the large cities. One in any degree familiar with this subject, would never question the right depending upon invincible necessity, in order to the maintenance of any show of administrative authority, among the class of persons with which the city police have to do. To such men, any doubt of the right to subject persons and property to such regulations as the public security and health may require, regardless of merely private convenience, looks like mere badinage. They can scarcely regard the objector as altogether serious. And, generally, these doubts, in regard to the extent of governmental authority, come from those who have had small experience."

The power of the legislature to impose new burdens, depends, of course, upon the inquiry whether the burden will impair the essential obligation of the contract, in the charter of the corporation. Washington Bridge Co. *v.* State, 18 Conn. 53. Thus, in this case, the plaintiffs had a grant to build a bridge over the Housatonic River in 1802, and by additional acts in 1808, the grant was made exclusive for

*subject the company, by a general law, applicable to all railway companies, to the duty of paying laborers, upon its works, whose wages are in arrear, and not paid by the contractors.[5]

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six miles on the river, provided that nothing contained in the grant should be construed to impair the rights of persons navigating the river. The company built their bridge, and kept it in repair according to the terms of the charter, until 1845, when the legislature passed a resolve requiring them to construct a draw, etc. so as to admit the free and easy passage of all registered or licensed vessels, whether sail or steam vessels, through their bridge, and the act specified a certain time when the draw should be complete, and that certain commissioners should accept the same, and also gave owners of vessels aforesaid, who should be delayed or detained by the insufficiency of the draw, right to recover damages sustained thereby, of the company. And the resolve further provided, that plaintiffs should be deprived of their power to take their tolls, as formerly, until the draw should be completed, and accepted, as aforesaid. Plaintiffs having failed to comply with the resolve, on an information in the nature of a *quo warranto*, alleging delays to vessels, etc. it was held, that the resolve of 1845 was not binding upon the bridge company, no reservation being made in the former acts and resolves, of power to vary or impose new burdens upon the corporation without its consent. See also Commonwealth *v.* Cullen, 13 Penn. 133; Bailey *v.* Railroad Corporation, 4 Harrington, 389. In the last case the company were authorized to build a bridge across a navigable stream, which would obstruct navigation therein, and a subsequent act was passed giving right of action in cases of obstructions, which the company did not accept, and it was held void. But as long as no rights become vested, i. e. before the company go into operation, for instance, the charter of a corporation is declared to be subject to the same legislative control as other statutes. Covington & Lexington Railway Co. *v.* Kenton Co. 12 B. Monr. 144; 2 B. Monr. 402; Beekman *v.* Saratoga & S. Railway, 3 Paige, 45; Baltimore & Susquehanna Railway *v.* Nesbit, 10 How. U. S. R. 395, where it is held, that until the title to lands which is in process of condemnation, for the purposes of a railway, becomes actually vested in the company, the legislature may change the mode of appraisal, no rights having, as yet vested. Acts of the legislature, imposing penalties upon a railway, for violating the provisions of its charter, in regard to fares, are valid. Camden & Amboy Railway *v.* Briggs, 2 N. J. 623. See also Roxbury *v.* Boston & Prov. Railway, 6 Cush. 424; Madison & Ind. Railw. *v.* Whiteneck, 8 Ind. R. 217.

In some recent cases in Kentucky, the subject of the inviolability of corporate franchises is much discussed. In City of Louisville *v.* The University, 15 B. Monr. 642, it was held, that a grant of land, by the city of Louisville, to the University, was an inviolable contract, both as to the city and the state; that the state had no control over the property or other essential franchises of corporations, not strictly municipal, and that even municipal corporations might hold property independent of state control, in all cases, where it was not held in trust for public purposes, under the supervision of the state.

[5] Peters *v.* Iron Mountain Railway, 23 Missouri, 107, 111.

6. As many private railway companies in this country have been sustained, to a great extent, by public patronage, in the form of legislative grants, either state or national, in lands, or by way of loans, subscriptions to stock, guaranty of securities, or otherwise, the question of the consequent right of legislative interference will be likely to arise hereafter, in different forms, and upon various grounds, or pretexts. The general question is undoubtedly one of interest and importance; and as it has hitherto arisen chiefly, in regard to private eleemosynary corporations, whose functions and duties are public, and whose funds have often been derived from public grants, it may not be altogether inappropriate here, to refer to some of the cases, which have arisen in that connection, as the question of the right of legislative control is substantially the same there, as in the case of railway corporations, and the reason and ground of the claim very analogous. This subject is discussed, very much in detail, in a carefully prepared opinion, in regard to the charter rights of the corporation of Trinity Church, New York, an extract from which here, will give all the information in our power.[6]

And in Sage *v.* Dillard, 15 B. Monr. 340, it is held, that a reservation in a legislative charter of the power to alter, repeal, or amend the same, does not imply the power to alter the vested rights acquired by the corporators, under the charter, and to add new parties, and managers, without the consent of the corporators. But in Monongahela Nav. Co. *v.* Coon, 6 Barr, 379, it was held to be competent, under a similar reservation, in an amendment to the charter of a corporation accepted by the company, for the legislature to create a remedy against the corporation for damages already done.

And in a recent case in Maine, Norris *v.* Androscoggin Railway, 39 Maine R. 273, it was held, that a general statute, subjecting railways which were required to fence their roads, by their charters, to a penalty of one hundred dollars for each month's delay, after certain steps had been taken by the land-owners, as it was a "remedial statute, passed for the effectual protection of property, peculiarly exposed, by the introduction of the locomotive engine, applied to corporations existing before its passage. Lyman *v.* Boston & Worcester Railway, 4 Cush. 288."

So a statute appointing commissioners to fix the compensation, which shall be paid for drawing passengers of another company over its road, is no infringement of the rights secured in its charter for regulating tolls on its road. Vermont & Mass. Railway *v.* Fitchburg Railway, 9 Cush. R. 369.

See also Baker *v.* Boston, 12 Pick. 184, 194; Vanderbilt *v.* Adams, 7 Cowen, R. 349; *ante*, § 78, n. 5.

6 "But the legislature have no control over the internal management of private corporations, which hold funds for the purposes of education, or religion, or

*SECTION III.

CONSTRUCTION OF EXCLUSIVE RAILWAY GRANTS.

1. *Such grants are to receive a strict construction in favor of the company.*
2. *How far such companies can claim under implied grant.*
3. *Ambiguous terms construed most strongly against the company.*

§ 233. 1. The principle, that exclusive grants, in derogation of common right, are to be strictly construed, is a principle of stat-

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general charity. This point is expressly decided in the leading case of Dartmouth College *v.* Woodward, 4 Wheaton, 518. The distinction, between public and private corporations, of this character, is thus stated, by Mr. Chief Justice *Marshall*, in the opinion of the court, in that case. 'If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act, according to its own judgment, unrestrained by any limitation of its power, imposed by the constitution of the United States.'

"'But if this be a private eleemosynary institution, endowed with a capacity to take property, for purposes unconnected with government, whose funds are bestowed by individuals on the faith of the charter,' &c. he concludes it is to be regarded as a private corporation, for the administration of a charity, in some sense of a public character.

"In illustrating the subject further, the learned judge adds, 'That education is an object of national concern and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer?'

"And in conclusion the learned judge says, 'It appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees, or governors, were originally named by the founder, and invested with the power of perpetuating themselves, that they are not public officers, nor is it a civil institution, participating in the administration of government, but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.'

"See upon this point Allen *v.* McKeen, 1 Sumner, 276, where it is said, 'Bowdoin College is a private and not a public corporation, of which the Commonwealth of Massachusetts was the founder, and the visitatorial, and all other pow-

utory exposition and construction, as old almost as the English common law. And it has received frequent applications to rail-

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ers, franchises and rights of property, of the college, are vested in the boards of trustees, and overseers, established by the charter, who have a permanent title to their offices, which can be divested only in the manner pointed out by the charter.' See also Bracken *v.* William and Mary College, 1 Call, 161, S. C. 3 Call, 573.

"In the case of the University of Alabama *v.* Winston, 5 Stew. & Porter, 17, we have the definition of a public college or university. That was a case where all the funds of the college were public property, and all its officers, even the trustees paid, and appointed, either mediately, or immediately by the state.

"But in University *v.* Foy, 2 Haywood, 310, 374, and in Den *v.* Foy, 1 Murph. 58, a grant of land to the university is held to have created vested rights, beyond the control of the legislature, on the ground, that the University of North Carolina is a private corporation. See also upon this point, confirming the general doctrine claimed, Wales *v.* Stetson, 2 Mass. R. 146. PARSONS, Ch. J. People *v.* Manhattan Co. 9 Wendell, 351. Thomas *v.* Daniel, 2 McCord, 354, admitting the same rule of construction after the constitution of the United States came in force. Yarmouth *v.* North Yarmouth, 34 Maine R. 411.

"These public grants to private eleemosynary corporations were common, both before and since the Revolution, and are still common," [even to joint-stock corporations, such as railways.] "And no one supposes, that because a college, or an academy, or a church corporation," [or any private corporation,] "receives a public grant of land, that it thereby becomes a public corporation, subject to the control of the legislature, so that its charter may be altered, or repealed, at the will of the legislature. That is true of most of the colleges and academies in the different states, and it was never supposed that they thereby lost the right of private control and independent corporate action.

"A public grant to a private corporation, for the general purposes of its creation, which contains no conditions or reservations, is as much irrevocable, and as really a gift beyond recall or control as any private grant made with the same incidents. And it imposes no more or different duties or responsibilities upon the donee from any private grant in the same terms. This proposition is fully maintained in the cases already cited, and especially in the Bowdoin College case, 1 Sumner R. 276, and University *v.* Louisville, 15 B. Mon. 642. And in the University of Maryland *v.* Williams, 9 Gill & Johnson, 365, this point is expressly decided. It is there said, 'If a corporation be eleemosynary and private at first, no subsequent endowment of it by the state, can change its character. It is not sufficient to render a corporation public, that its ends are public.'—'Colleges and academies for the promotion of piety and learning, and endowed with property by public and private donations are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c. considered as private eleemosynary corporations.'

"It is also true of every amendment of the charter of a private corporation, conferring new franchises, or privileges, or upon new conditions, that it does not become binding upon the corporation, unless by the acceptance of the corporation. And the acceptance of an amendment of the charter of an eleemosynary

way charters, and especially in regard to those exclusive grants, by which subsequent similar incorporations are prohibited.[1] It

corporation, by a majority, who for all purposes, in such corporations, represent both the corporation and the donors of its funds, is all that is ever required. Louisville *v.* The University, 15 B. Monroe, 681; by STORY, J., in Dartmouth College *v.* Woodward, 4 Wheaton R. 518, 666, *et seq.* See also upon this point the following cases, fully sustaining the view here taken, ROGERS, J., in Ehrenzeller *v.* Union Canal Co. 1 Rawle, 190; Commissioners *v.* Jarvis, 1 Monroe, 5.

"In the case of Washington Bridge Co. *v.* The State of Connecticut, 18 Conn. R. 53, the point is expressly decided, that any enlargement of the charter of a private corporation, so accepted as to become binding, is the same, as to its inviolability, as if it had formed a part of the original grant. The same principle is maintained in Gordon *v.* The Appeal Tax Court, 3 How. U. S. R. 133. See also University of Maryland *v.* Williams, 9 Gill & Johnson, 365, where the same views are maintained. In Norris *v.* The Abington Academy, 7 Gill & Johnson, 7, it was held, that even where the corporation, in performance of the condition of an act of the legislature, enlarging its powers, and for a pecuniary consideration, had conveyed all their estate and effects to the state, that the legislature nevertheless could not vest the government of the corporation in a new board of trustees. And in Vermont, where the state, in the charter of towns, reserve one right of land for the use of a county grammar school, and had incorporated such a school, with power to receive the rents of such lands, it was held, they could not subsequently divert any portion of the rents, to the use of other similar schools, subsequently created. Burt *v.* Caledonia County Grammar School, 11 Vt. Rep. 632.

"In Mechanics & Traders' Bank *v.* Debolt, 1 Ohio St. R. 596, and in Toledo Bank *v.* Bond, 1 Ohio St. R. 622, it was attempted to be maintained, in the opinions of the court, in deciding the cases, that the charter of a private corporation, like a bank, is not a contract, within the meaning of the United States constitution, prohibiting the legislatures of the several states from passing laws impairing the obligation of contracts, but an act of legislation which may be repealed whenever the legislature shall deem it expedient. But these cases were reversed, in the national tribunal of last resort, and the doctrine of the case of Dartmouth College *v.* Woodward reasserted, so late as 1855, in the cases of Dodge *v.* Woolsey, 18 How. R. 331; Mechanics & Traders' Bank *v.* Debolt, 18 How. R. 380, and Same *v.* Thomas, 18 How. R. 384.

"The general doctrine of the inviolability of corporate rights and franchises, so far as private corporations are concerned, and which are of a pecuniary character and quality, that is, are intended and calculated to affect property, is recognized, in all the states, where the question has arisen, unless Ohio form an exception. The following cases involve the discussion of that very point, more or less directly. Commercial Bank *v.* The State, 6 Smedes & Marshall, 599; Common-

[1] Bradley *v.* New York and New Haven Railway, 21 Conn. R. 294; Boston & Lowell Railway *v.* Andover and Wilmington Railway, 5 Cush. 375; Brocket *v.* Ohio and Penn. Railway, 14 Penn. 241; 6 Paige, 554.

was held, that where a railway charter gave the company "authority to vary the route, and change the location, after the first selection had been made, whenever a cheaper and better route could be had, or whenever any obstacle to the location was found, either by difficulty of construction, or procuring right of

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wealth *v.* Cullen, 13 Penn. St. R. 133; Bank of the State *v.* The Bank of Cape Fear, 13 Iredell, 75; Brown *v.* Hammond, 6 Penn. St. R. 86; City of St. Louis *v.* Russell, 9 Missouri, 507; New Orleans, &c. Railway *v.* Harris, 27 Mississippi R. 517; Slack *v.* Maysville & Lexington Railway, 13 B. Mon. 1. See also The People *v.* The Manhattan Co. 9 Wendell R. 351; Same *v.* The Supervisors of Westchester, 4 Barb. 64.

"The distinction between the class of corporations, where the right of legislative control does, and where it does not exist, is well stated, in the case of Louisville *v.* The President & Trustees of the University, 15 B. Monroe, 642. It is there held, that 'the state does not possess unrestrained power over a corporation not invested with political power, nor created to be employed and partake in the administration of government, nor to control funds belonging to the state, nor to conduct transactions in which the state was alone interested.' 'The legislature has such power over such corporations alone as may be characterized as the agents or instruments of the government.' 'An University is not such a corporation, and funds bestowed upon it by a city, are beyond legislative control. The original charter of the University of Louisville creates a private corporation, and so much of the amended charter of the City of Louisville, as relates to the preëxisting charter and corporation of the University, and vests, or professes to vest, in a new corporation, or in new trustees, the property and privileges of the original corporation, is in violation of the United States constitution, and void.'"

The distinction between the inviolability of the rights and immunities, attaching to public and private corporations, is extensively discussed in a late case in New Jersey, Tinsman *v.* The Belvidere Delaware Railway, 2 Dutcher, 148. It is there held, that railway corporations are strictly private, although performing many important public functions, and invested with prerogative franchises, to a certain extent, so far as the construction of their works is concerned, but that these companies do not possess the same immunity from liability to make compensation for private damage, caused by the construction and operation of their works, which would attach to persons in the execution of a strictly public trust, for the public benefit. It is considered, that these companies' works being constructed by private capital, for private emolument, the companies must be subject to the ordinary liability of private persons, for all such acts as are not expressly, or by necessary implication, conceded to them, on behalf of the sovereignty, by their charter powers. It is said here, that public corporations are such only as are created for political purposes, to carry forward the functions of the state; over public corporations the legislature have an unlimited control, to create, modify, or destroy, at pleasure, but the grant and acceptance of a private charter is a compact, which the legislature cannot violate; the liability of the corporation for damages does not depend upon, whether it is public or private, but whether the franchise is created for private emolument or exclusively for the public good. *Ante*, § 75, n. 4.

way at reasonable costs, that authority was not thereby conferred upon the company to relocate their road, after it was finished.[2]

2. So, too, a stipulation in the charter of a railway, that no other one shall be granted, from one terminus to any place within five miles of the other terminus, is not violated, by the grant of a railway, from one terminus of the former one to a point coming within the space included by two straight lines, drawn from the former terminus of the first road, to points five miles distant from the other terminus, upon opposite sides, but not within five miles of the actual terminus of the first road.[3] But although a railway company cannot ordinarily claim an extension of its franchises, by implication, it does take, by implication, such powers as are indispensable to the enjoyment of those expressly granted.[4]

*3. And the same rule applies to the grant of lands for the purpose of a railway, even where the necessary use should involve the extension of ditches upon other lands of the grantor.[5] And ambiguous words are to be construed most strongly against the company.[6] But the right to take lands, or the right of way required for the purpose of constructing the roads, must include land for stations and other necessary works, connected with the operation of the road.[7]

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2 Moorhead *v.* Little Miami Railway, 17 Ohio R. 340. In Milnor *v.* The New Jersey Railway, 6 Law Reg. 6, it was decided that the mere establishment of a particular line of road, and erection of a bridge in a particular location, in a town, by a railway company, after a controversy with the inhabitants with respect thereto, does not amount to a contract so as to preclude the company, after a lapse of time, from changing the direction of their line and the position of the bridge. See upon this point, Glover *v.* Powell, 2 Stockton's Ch. R. 211; *Ante*, § 78, n. 5.

3 Boston & Lowell Railway *v.* Andover & Wilmington Railway, 5 Cush. 375.

4 Enfield Toll-Bridge Co. *v.* H. & N. H. Railway, 17 Conn. 454; Springfield *v.* Conn. River Railway, 4 Cush. 63; White R. T. Co. *v.* Vt. C. Railway, 21 Vt. R. 595; State *v.* Baltimore and Ohio Railway, 6 Gill, 363. In this case it was held, that the directors being the sole judges of the propriety, and the means of declaring dividends, could not lawfully declare a money dividend of $3 to all stockholders of less than fifty shares each, and $1 in money and $2 in the bonds of the company, to those having more than fifty shares.

5 Babcock *v.* The Western Railway, 9 Met. 553.

6 Perrine *v.* Chesapeake and Delaware Canal Co. 9 How. Sup. Ct. R. 172.

7 Nashville and C. Railway *v.* Cowardin, 11 Humphrey, 348.

*CHAPTER XXXII.

RAILWAY INVESTMENTS.

SECTION I.

POWER OF COMPANY TO DO ACTS AFFECTING THE VALUE OF THEIR STOCK AND BONDS. OVERISSUE OF STOCK.

1. *The importance and unsettled state of the law upon the subject.*
2. *The English statute requires the stock subscriptions to precede the grant.*
3. *Duty of railway directors, in regard to speculations in shares.*
4. *Nature and effect of desperate financial expedients in building railways.*
4. (1.) *Issuing stocks in railways, at different prices, fraudulent.*
4. (2.) *Mode of issuing bonds and mortgages objectionable.*
5. *Difficulty of preventing this by legislative restrictions, no excuse.*
6. *Something might be effected by legislation.*
7. *These losses fall severely upon small owners.*
8. *Overissue of stocks somewhat of a similar character.*
9. *Case of New York & N. H. Railway before Superior Court.*
10. *Same case before the Court of Appeals.*
11. *The principles involved in similar cases.*
12. *Right of canal company to mortgage tolls, without consent of legislature.*

§ 234. 1. THERE is perhaps no subject connected with the law of railways, which comes home, so directly to the pecuniary interests, of so large a number of persons in this country, as that of railway investments, in the various forms of stock, original, and preferred; and bonds and mortgages. But it will not be in our power to give much information, upon the subject, and none probably which will afford relief to those, who have adventured their money, in these enterprises, which so generally, in this country, have proved unproductive. But few questions, in regard to the subject, have yet been definitely settled, in this country, and these, for the most part, are of secondary importance, in comparison of those, which yet remain.[1]

2. This subject is incidentally alluded to, in former portions of the work.[1] In England the provisional committees of the promoters *of railways issue scrip certificates, which are publicly

[1] *Ante*, §§ 17, 41, 55, 56, 59.

sold at the stock-exchange,[2] and pass from hand to hand, by delivery,[2] without the necessity of formal transfers or stamps.[3] The holders of these scrip certificates ordinarily have their names entered upon the registry of shareholders, after the act of incorporation is obtained, and thus constitute the members of the corporation, and are liable for calls.[4]

3. We have seen, too, that all speculating practices of the directors of a railway, or other business corporation, with a view to raise the market value of shares, are fraudulent, and will be relieved against in equity, and the participators punished criminally.[5]

4. There have been some expedients resorted to for the purpose of enabling companies to complete their works, without the requisite capital, *bonâ fide* subscribed and paid in, which as they do not seem to have come much under discussion, in the judicial tribunals of the country, we could do little more than allude to, but which have so serious a bearing upon the safety and permanent value of railway investments, that we could not, perhaps, with perfect propriety, altogether pass over them. Where the charter of a railway company does not limit the amount of capital, except by the necessity of the undertaking, as the work progresses, the stock naturally becomes, more or less depreciated in the market, and it has sometimes been the practice of the directors, either with, or without, a vote of the shareholders, to issue shares, at a reduced price, so much below the market price, as to induce sales. And sometimes such an expedient has been repeated, according to the necessities of the case, and the desperate fortunes of the enterprise. Such practices cannot fail to strike all minds alike, as desperate financial expedients,[6]

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[2] London Grand Junction Railway Co. *v.* Freeman, 2 Man. & Gran. 638, 639; Jackson *v.* Cocker, 2 Railw. C. 368, 372; Hasseltine *v.* Siggers, 1 Exch. 856.

[3] Willey *v.* Parratt, 6 Railw. C. 32; s. c. 3 Exch. 211; Vollans *v.* Fletcher, 1 Exch. 20; Moore & Garwood, 4 Exch. 681.

[4] *Ante*, § 29, 53. *Post*, App. A. § 2.

[5] *Ante*, § 41, 59, 179.

[6] Herrick *v.* Vermont Central Railway, 27 Vt. R. 673, 692. Opinion of court: "This building railways, at vast expense, with no adequate means, is desperate business, and I do not think we should be surprised to find desperate efforts and desperate expedients resorted to by the best of men, whose very lives, and all earthly hopes, stand upon the event of their success or failure. But I could not feel justified in allowing a court of equity to interfere—unless complaint was made at the time." But the courts have felt compelled to recognize them as valid,

and, more or less, fraudulent in their *operation upon the market value of stock, sold at a higher price. But we see no reason to

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and binding unless resisted, in a formal and judicial mode. The case of Faulkner *v.* Hebard, 26 Vt. R. 452, may be of interest in this connection: "Where F. & H. entered into a written contract, by the terms of which H., in consideration of a certain number of shares of stock in the Vermont Central Railway Co. 'to be delivered, to me (H.), by F. on or before the first day of July, 1850,' agreed to sell and convey certain property to F., and this contract was signed by both parties. *Held*, that the contract was upon sufficient consideration; and that both parties are bound to do what is specified in the contract to be done on his part; and that if F. had declined to deliver the stock according to the terms of the contract, an action would lie upon the contract, for the refusal.

"And in such a contract, the delivery of the stock, and the conveyance of the property are *concurrent acts;* and as the one promise is the entire consideration of the other, neither party would be bound, to absolutely convey his property, except upon the conveyance by the other.

"But either party, claiming damages for non-fulfilment of the contract, must either show a readiness, and offer to perform on his part, or that he was excused therefrom by the consent or the conduct of the other party.

"The directors of the railway company, before the sale, but without the knowledge of the parties, by letting in those who paid but $30, to an equal participation in the profits of the company, with those who paid $100, lessened the market value of the stock which F. by the contract sold to H.; *it was held*, that if this act of the directors was a legal one, then it was one which H. was bound to know they might do, and would therefore form one of the contingencies of H.'s purchase; and whether the act of the directors was before or after the actual time of sale, would no more affect the validity of the sale, than any other legal act of theirs; but if the act was an unlawful exercise of authority, by the directors, then H. when he became a stockholder might resist it in any legal way; and therefore it will form no defence for H. in a suit for non-performance of the contract." In giving judgment, the court say:—

"But the important question in this case is, whether the plaintiff can recover at all. The finding of the jury negatives all fraud or intentional misrepresentation, on the part of the plaintiff, or even knowledge of the circumstance, which it is claimed should exonerate the defendant from his contract. The only question, then is, whether the parties were under such a mutual misapprehension, in regard to the actual state of the subject-matter of the contract, at the time of entering into it, as will relieve the defendant from the obligation of it. This is a familiar ground of relief from the performance of contracts in a court of equity, and as a general thing confined mainly to that forum. But in some few cases it has been allowed, as a defence, at law. The case of Ketchum *v.* Catlin, 21 Vt. 191, has perhaps gone to the full extent of such relief, in a court of law, and may be regarded as laying down the law, as it now stands, in regard to defence at law to contracts, on the ground of mutual misunderstanding in regard to the state of the subject-matter at the time. And this case goes upon the ground, that to constitute a defence at law such subject-matter must be so changed, at the time of the contract, without the knowledge of either party, as not in any sense

doubt their binding obligation upon *those who approve them, by their votes, and it would seem, that the minority, who vote

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to answer the purpose, for which the contract was made. This mode of defence goes upon the assumption, that if the party buys one thing, or a thing, in one state, he is not bound to accept of a different thing, or the same thing, in a different state. If property is sold, as being in existence, and in fact has been destroyed, or changed state, the sale will be inoperative.

"But any accidental occurrence, not directly affecting the state or quality of the thing sold, but only its market value, will have no such effect. News of peace or war, or commercial restrictions, or their modification, has often a most surprising effect upon the market value of commodities, but whether both parties, or one only, is ignorant of such facts, which renders the matter more unjust and unequal, is no ground of relief even in equity, unless the one party gaining the advantage, is guilty of artifice, or misrepresentation. The rule of the civil law was somewhat different, and more in accordance with the rule of moral justice and equity, than that of common law. This has been with some writers a ground of reproach to the common law, as being less in accordance, with the principle of Christian morality, than the law of pagan Greece and Rome. And the case put in *Cicero de Officiis* is of this character, where the two cargoes of corn coming into Rhodes, in time of famine, or great want, and the one first reaching port, knowing of the near approach of the other, with a large supply, the question is whether the first is bound, before he sells his cargo, to make known the probable early arrival of the other? The Roman casuist decides that he is, and so must a Christian moralist; but the common law will not allow any such determination, in a civil tribunal!

"So, too, stocks may be affected, by general legislation, by the granting of other charters, by governmental negotiations, by war, or peace, by the management of the corporations, by the result of an election, by the death of an important financial agent, and by a thousand other accidental matters. The question is, whether such mere accidents, not affecting the inherent quality of the stocks or essentially their actual value, can be said to create such a change of state, as to justify the vendee in refusing to go forward with his contract. I have not been able to find any such case, and the books abound with those of an opposite character.

"Had this vote of the directors cancelled, or annihilated the stock, it would no doubt have been a good ground of defence to this action, within the principle of the best considered cases upon the subject. But so far from that, it did not affect the stock in any sense, except incidentally, by its increase, at a low rate. This had three accidental effects upon all the stock of the company. 1st. It showed the company to be embarrassed, if not desperate, which of itself had a tendency to lessen the market value of the stock, but not its real value. 2. It showed the probable opinion of the directors that the stock was not worth much above $30, which would have a similar effect. 3d. If it was a legal act it did tend to lessen in some degree the actual value of the stock, by letting in those who paid but $30, to an equal participation in the profits of the company, with those who paid $100. But if this was a legal act, it was one which the defendant was bound to know the directors might do, and which would therefore form one of the contingencies of

against them, should take measures to stop *them, before the stock goes into the market and falls into the hands of *bonâ fide* purchasers, or they will be precluded from objecting afterwards.[6] Questions of this kind will doubtless come before the courts, and we do not intend to express any very settled opinion upon them here. A very similar series of expedients is perhaps more commonly practised, by way of bonds and mortgages, and preferred stock, which indeed amounts to much the same thing as a mortgage, under a different name. In this country these mortgages have usually been so framed, as to create successive liens, in the order of their being issued, as first, second, and third, mortgage bonds. These are issued in large general sums, subdivided, to suit the wants of purchasers in the market, and when sold at par and above, are perhaps the most unobjectionable mode of completing an enterprise, that otherwise must stop *in medio*. But when sold, as they commonly are, at reduced prices, in proportion to the waning fortunes of the company, they must of course destroy, at once, the credit of the stock, and operate harshly upon its holders.

This is not the place, nor are we disposed, to read a homily upon the wisdom of legislative grants, or the moralities of money-eyed speculations, in stocks, on the exchange, or elsewhere. But it would seem, that legislation, upon this subject, should be conducted, with sufficient deliberation, and firmness, so as not to invest such incorporations, with such unlimited powers, as to operate as a net to catch the unwary, or as a gulf in which to bury out of sight, the most disastrous results to private fortunes, which has justly rendered American investments, taken as a whole, a reproach, wherever the name has travelled. Experience will perhaps show, that desperate enterprises require desperate means, for their accomplishment, and will always find men, for their management, whose characters will conform more or less,

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his purchase, and which, whether done before or after the actual time of sale, could no more affect the validity of the sale, than any other legal act of the directors. If the act was an unlawful exercise of authority, by the directors, the defendant when he became a stockholder might resist it, in any legal way.

"The length of time given the plaintiff to deliver the stock must have involved the hazard of the directors doing many things, which might affect the stock, and indeed, every legal act certainly, and illegal acts would not bind the stockholders. We do not see how this will form any defence to the suit, there being no fraud or misrepresentation."

to the necessities of their position. And if by legislative restrictions, they are precluded from the more obvious devices and expedients, for the relief of their straitened fortunes, they will only be forced to the *adoption of such as are more complex, less superficial, and consequently the more likely to seduce inexperienced capitalists into their investments.

5. But even this is no apology for such unrestricted powers as are often given to these companies. And the mode in which such things are here carried through the legislature, by means of agents, who have, where there are no rival interests, very much their own way, without even the necessity of subjecting their plans, to any permanent board of supervision, who shall have such matters under control, and devote such time to their study, as not to be misled, by the devices of the interested; this mode of accomplishing such things, sufficiently explains, why, in this country, no restrictions are placed upon such companies.

6. If some reliable estimate of the cost of such undertakings were obtained, by means of a board of trade, or railway commissioners, and no work allowed to go forward, until a large proportion or the whole of the requisite capital were obtained, by stock subscriptions, it would afford great security.[7] And if all mortgages, at whatever time given, were placed upon the same footing, as to priority,[7] it would give far less temptation to speculation in mere bubble investments, which is too much the case in this country. But there is perhaps no remedy, for this incautious legislation in this country, but the severe and hard discipline, of that most painful, but surest teacher, experience. It is, we think, rather creditable to the promoters of railways in this country, that with such unlimited powers, as their charters confer, they have been so little abused, and this, in the main, not often by design, or for private ends, but through inexperience, and want of skill.

7. We have deemed it not improper to allude to this subject, in this connection, chiefly because of the far greater severity and extent, to which such losses are felt throughout society, in this country, than in older states. Here we have no national funded stock, in convenient sums, for small investment, and which being

[7] Both these requisites are contained in the English Railway Acts, and the standing orders of parliament. Hodges on Railways, 16–44. Companies' Clauses Consolidation Act, 8 and 9 Vict. ch. 16, § 42, 44; Hodges on Railways, App. 73, 74.

sure is really a great blessing to the mass of those, who wish to invest moderate sums, as a protection against age or calamity. In those countries, where such opportunities exist, it removes all temptation to invest small sums, in these enterprises, which, *however necessary for the public, such small owners can but poorly afford to aid in carrying forward, and which consequently should, in justice, either be guarantied or owned, by the state, or at all events aided by state credit, when they become indispensable for the public convenience, but are so extensive or so little remunerative, at first, as to be an unsafe undertaking, for private enterprise.[8]

8. There is a class of questions, somewhat analogous to some of the foregoing, which has arisen extensively, in this country, in regard to a few companies, which is denominated the overissue of stock. By this is understood, an express fraud, by managing directors, or agents, in issuing stock, without any authority, and in many instances, mere fictitious stock, after all the shares, created by the charter, had been issued and sold. There was a strong disposition manifested, at first, among the legal profession, and business men, to hold such fictitious shares, entitled to the same claim, upon the funds of the company, as the genuine shares, and that the only effect of the overissue would be to diminish, in the same proportion, the amount and value of the genuine shares.

9. This opinion was based upon the view, that the company having intrusted their agents, with the means of putting such spurious stock in circulation, should be bound by their acts. This was a plausible view certainly, and the courts, before whom the questions first came, very generally adopted it.[9]

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[8] We are conscious of the very serious objections, which exist practically against state management of public works. They are not likely to be as productive or as efficient under such control, and are liable, in popular governments, to serious abuse, as a medium of favoritism, nepotism, and every species of partiality, in the way of state patronage. But there should be some mode of equalizing public burdens, for such works, and, in practice, none perhaps has operated better than the loaning of state credit, which creates a reliable stock, for capitalists, small or great, and affords some security, that the management will be as good, as public servants can be found ready to secure, and that legislation will be more carefully watched, than where the public have no interest.

[9] Mechanics Bank of the City of New York *v.* N. Y. & N. H. Railway, 4 Duer, 480. The case in this court was put mainly upon the ground of the authority of the transfer agent of the company, he having certified to the genuineness of the

10. But subsequent investigation of the subject, before the * courts of final resort, led to a different conclusion, especially, in regard to cases of stock issued beyond the limit of the charter, and where consequently there was a defect of power in the corporation itself, to issue the stock, and also where the stock was originally transferred to one, aware of the mode, in which it was created, although subsequently coming into the hands of a *bonâ fide* purchaser. It was held that where the act, if done by the corporation, would have been *ultra vires*, the transaction when done, by the directors, could have no force, and even when the corporation had power, and the manner of employing the agent enabled him to bind the company, in a contract, with one ignorant of his bad faith, yet if such person was aware of the bad faith of the agent, he not only acquired no title to the stock, but a *bonâ fide* purchaser of him, would stand in no better situation.[10]

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stock, and that this being an act, within the acknowledged scope of his employment, would bind the company.

And even if the company had not power to issue stock, beyond the amount limited in their charter, in regard to which the court were not agreed, still the promise to issue it will bind them, and render them liable in damages, which will produce the same result, as if the shares were to be held genuine.

[10] Mechanics Bank *v.* N. Y. & N. H. Railway, 3 Kernan, 599. The case is here put by the court upon the following grounds: "By the act creating a corporation, its capital stock was limited to $3,000,000, and divided into shares of $100 each, transferable in such manner as the company should direct; the entire stock was taken, and certificates issued therefor to the owners; and the by-laws of the company prescribed that transfers of stock should be made on the transfer books of the company, and required the certificate of ownership to be surrendered prior to the making of such transfer and the issue of a new certificate. The company established a transfer agency, and appointed their president transfer agent, who was authorized and accustomed, on the transfer of stock on the books in his charge, and the surrender of the certificate therefor, to execute and deliver to the transferree the usual certificate, stating that he was entitled to the number of shares of . . . stock specified therein, transferable on the books of the company by him or his attorney on the surrender of the certificate; the agent fraudulently gave to one Kyle a certificate, in the usual form, for eighty-five shares of stock, when, in fact, the latter owned no stock, none stood on the books in his name, and no certificate for such stock had been surrendered; the plaintiffs, in good faith, and relying upon the certificate as regularly issued and valid, made a loan to Kyle, receiving from him the certificate, with an assignment of the stock and a power of attorney to transfer the same. In an action by the plaintiffs against the corporation for refusing to permit the stock represented by the certificate to be transferred on its books, or to pay its value; *Held*, that the certificate was void, and that the

11. And it is, we think, impossible to doubt, that the final result *arrived at, is far more consonant with acknowledged principles, than the one first attempted to be maintained, and is attended with fewer embarrassments and refinements. And it is by no means certain, that it is not equally in accordance with the soundest principles of equity and moral justice. For whatever may be said of the duty of corporations, to employ only

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plaintiffs did not thereby acquire a right, legal or equitable, to any stock; and *held*, further, that the corporation was not responsible to the plaintiffs for damage sustained by dealing upon the faith of the certificate.

" Such a certificate does not partake of the character of negotiable instruments; and the *bonâ fide* assignee, with a power to transfer the stock, takes the certificate, subject to the equities which existed against his assignor.

" Also, *held*, that on the facts of the case, the doctrine of *estoppel in pais* was not applicable."

At a special term of the Supreme Court, in New York, it was recently decided that a bill to enjoin the holders of railway bonds and other securities, which had been deposited with an agent of a railway company with power to sell or pledge the same, for the purpose of raising money for the use of the company, and which it was alleged had been misapplied by such agent, and were now in the hands of numerous parties, upon different and independent contracts, which were severally alleged to be invalid, as against the company, could not be maintained against the agent, and the several persons into whose hands he had passed the securities, there being no privity among the several defendants. But upon general principles of equity, it would seem that such a joinder amounts to multifariousness only, when the securities, in the hands of the different defendants, are wholly distinct; in which case, only the agent, and the particular person or persons, obtaining each separate parcel of the securities, constituting one transfer, should be joined. But if the fund were one, and inseparable, all participating in its transfer may be joined. Lexington & Big Sandy Railway *v.* Goodman *et als.* 9 Am. Railway Times, No. 52.

In a very recent case, before V. C. Stuart, it was decided, upon great consideration, that, where the directors of a joint-stock corporation issue debentures, (which are, in form, the bonds of the company, but not negotiable,) without complying with the requirements of the deed of settlement, in regard to borrowing money; and such securities came into the possession of *bonâ fide* holders, for value, without notice of any infirmity affecting them, such holder could not recover for them, as against the great body of the shareholders. The learned vice-chancellor professed to base his judgment upon the authority of Ernest *v.* Nicholls, 6 H. Lords Cases, 401.

The learned judge seems to have arrived at a similar conclusion to that stated in the text; that persons, dealing in the market, for the debentures of a company of this sort, are bound to use reasonable precaution, in seeing to the authenticity of the documents they are purchasing. But see Greenwood's case, 23 Eng. L. & Eq. R. 422; s. c. 3 De G. M. & G. 471. Athenæum Assurance Co. *v.* Pooley, 31 Law Times, 70.

reliable directors, and transfer agents, and of the justice of the company, being bound by their acts, within the apparent scope of their employment, all of which are, in general terms, most undeniable propositions, still, something is due to common prudence and reasonable caution, on the part of those, who deal in stocks, to see, at least, what the charter and books of the corporation, will, at once, exhibit, to any one who will examine.

And if instead of making reasonable examination of matters, obviously within his reach, one sits down blindly to adventure millions, upon a spurious issue of stock, in such sums, and at such times, as to induce most prudent men, to hesitate about its genuineness, it is perhaps not unreasonable, that he should be held bound, by such facts, as the slightest examination must have disclosed. This is the rule in regard to most commercial and business transactions, and we see no special hardship in its application here, within reasonable limits.

12. In a recent case in Pennsylvania it is held, that a canal company cannot, without the consent of the legislature, mortgage either its tolls, or such real estate, as is necessary for the enjoyment of its corporate franchises.[11]

SECTION II.

RIGHTS AND REMEDIES OF BONDHOLDERS AND MORTGAGEES.

1. *Under English statutes tolls only mortgaged. Ejectment will not lie.*
2. *But if priority of lien is created, ejectment will lie.*
3. *The English acts allow no covenant to refund the money, in railway mortgages.*
4. *But bond creditors, and mortgagees, where there is no restriction, may have covenant against company.*
5. *All parties, standing in same right, necessary parties to bill.*
6. *After appointment of receiver by court of equity, counter claimants cannot contest his rights, except in court of equity, or by their permission.*
7. *Priority of right determinable only, upon motion to discharge the order of appointment.*
*8. *Where charter creates a lien in favor of bill-holders, this is subject to the lien of contractors or construction.*
9. *Some American cases hold railway companies may mortgage franchise, without consent of legislature.*
10. *Power to buy and sell real estate, and to borrow money, implies the power to mortgage for its security.*
11. *Company receiving benefit of money, estopped to deny authority of agent.*
12. *The mortgage of the property, or of the franchises, by the corporation, does not transfer the title to the corporate franchise.*
13. *Statement of a leading case in New Hampshire.*

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11 Steiner's Appeal, 27 Penn. R. 313. See this subject further discussed in § 181, 235, n. 13.

14. *The right to mortgage subsequently acquired property maintained in equity in Kentucky.*
15. *Similar decision in equity in New Jersey.*
16. *And in the Circuit Court of the United States.*

§ 235. 1. The remedies under railway mortgages will depend very much, of course, upon the powers granted by the legislature, and the forms of the contracts, by which the mortgages are created. By the English acts more commonly it is only the tolls, and accruing profits of the road, and future calls, which are allowed to be mortgaged.[1] Under these mortgages it was decided, that the mortgagee could not maintain ejectment, even where the deed purported to convey the undertaking, with all the estate, right, title, and interest, of the company, in and to the same.[2] This decision goes mainly upon the ground of defect of authority under the act.[3] Similar decisions were made, at an early day, in regard to mortgages of canal and turnpike property, by trustees, under act of parliament.[4]

2. But where these mortgages create successive liens, it has been held that ejectment will lie, and even a second, or subsequent mortgagee, of turnpike and canal tolls, including toll-houses, may maintain ejectment, and after the satisfaction of his own debt, hold for the benefit of those entitled.[5] So, too, when the mortgage is of an aliquot portion of the tolls and toll-houses, the trustees of the work, who receive sufficient tolls, on the portion conveyed, to meet the interest on the mortgage, are not liable to an action for money had and received; but only in equity,

1 8 & 9 Vict. c. 16.

2 Doe *dem.* Myatt *v.* St. Helen's & Runcorn Gap Railway, 2 Q. B. 364; s. c. 2 Railw. C. 756.

3 The acts under which these contracts were made were in these words: The directors for the borrowing of not exceeding £30,000, may "charge the *property of the said undertaking, and the rates, tolls, and other sums, arising and to arise, by virtue of this act.*"

4 Fairtitle *v.* Gilbert, 2 T. R. 169. But see Doe *d.* Banks *v.* Booth, 2 B. & P. 219.

5 Doe *d.* Thompson *v.* Lediard, 4 B. & Ad. 137; Doe *d.* Watton *v.* Penfold, 3 Q. B. 757; Doe *d.* Levy *v.* Horne, ib.

And where a prior mortgagee, under a power of sale, disposes of the property, the purchaser takes the property relieved of all subsequent mortgages, and the only remedy remaining, to such mortgagees, is a resort to the surplus, accumulated by the sale, if any, in the hands of the prior mortgagee. This point was decided in the House of Lords, (1857,) in Southeastern Railw. Co. *v.* Jortin, 31 Law Times, 44, reversing the decisions of the vice-chancellor and of the Chancery Court of Appeals.

which would seem to be the *only remedy of the mortgagee, unless by taking possession of the works, and receiving the tolls.[6]

3. And under mortgages executed in conformity with the English acts, no action lies against the company upon the deed, to recover the money loaned, or the interest, the acts of parliament only authorizing a mortgage of the tolls, &c. and not a personal covenant.[7]

4. But bond creditors may maintain covenant for the money loaned.[8] And where there is no restriction in the act of parliament, and the company, having the usual powers of a corporation, are allowed to borrow money, and to secure the payment of the same, by an instrument, which, upon the face of it, imports a covenant for payment, an action of covenant, for the repayment of the money, will lie against the company.[9]

5. But where a mortgagee, or bond creditor, goes into equity for relief, it seems to be the settled rule of that court, that all standing in the same relation with the plaintiff, must be made parties to the bill, either as defendants, or by bringing the bill on behalf of all such, as may choose to come in, and take part in the controversy, or avail themselves of the benefits of it.[10] In such case a receiver is appointed, who is to pay out the money received from tolls, &c. under the order of the court of chancery, according to equitable priorities.

6. And after the appointment of a receiver, by the court of chancery, and possession taken by him of the effects of the com-

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6 Pardoe *v.* Price, 11 M. & W. 427; 13 M. & W. 267; 16 M. & W. 451.

7 Pontet *v.* Basingstoke Canal Co. 3 Bing. N. C. 433.

8 Price *v.* Great Western Railway, 16 M. & W. 244.

9 Hart *v.* The Eastern Union Railway, 8 Eng. L. & Eq. R. 544; s. c. in error, 14 Eng. L. & Eq. R. 535; Bolckow *v.* Herne Bay Pier Co. 16 Eng. L. & Eq. R. 159; Perkins *v.* Pritchard, 3 Railw. C. 95; Hill *v.* Manchester Water-Works, 2 B. & Ad. 544.

10 Mellish *v.* Brooks, 3 Beav. 22; Hodges *v.* Croydon Canal Co. id. 86. These bonds and debentures, which stipulate for interest till a given time; when payment of the principal shall be made, bear interest, till payment, according to the English practice, where interest is not so universally allowed, as in our courts. Price *v.* Great W. Railway, 16 M. & W. 244; 4 Railw. C. 707. A mortgagee, who takes possession of the works, is liable to be called to an account, by any other mortgagee, standing in the same degree of priority. Fripp *v.* Stratford Railway & Canal Co. 29 Law Times, 107; Crewe *v.* Edleston, 29 Law Times 241.

pany, all other creditors, whether of the same, or a superior, or inferior degree, are precluded from contesting their rights, with the *creditors, on whose behalf, the receiver acts, by attachment, or levy upon the goods, such act being regarded, as a contempt of the court of chancery, as long as their officer holds custody of the goods and effects of the company, by an order from them. And that court will not entertain the question of priority of right, in reply to the attachment for contempt. But if any other creditors claim priority, and wish to assert such priority of right, to the effects of the company, in the hands of the receiver, they must apply to the court of chancery for leave to do so, before that court.

7. So, too, the court of chancery refuses to entertain the question of the propriety of the appointment of the receiver, upon any collateral inquiry, and will do so only, upon the motion to discharge the order.[11] And upon such motion the question of the priority of the execution creditor will be considered, and if maintained, he will, by order of the court of chancery, be allowed to levy, notwithstanding the appointment of the receiver, unless his debt be paid into court.[12]

8. Where the charter of a railway company, with banking powers, made the road a pledge for the redemption of the bills, or notes, of the company, it was held, that this created a paramount lien, upon only so much of the road, as was constructed by the company: and that the portion constructed, by the contractors, under a mortgage to secure them, for the work done, was first liable to the contractor's lien, before the bill-holders could interpose any claim.[13]

9. But it seems to have been considered, in some of the American states, that railway companies, upon general principles, possessed the power to mortgage their effects, in such a mode, as to transfer the beneficial use of the franchise, for the benefit of

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[11] Russell *v.* The East Anglian Railway, 6 Railw. C. 501; s. c. 3 Mac. & G. 125; Fripp *v.* Chard Railway, 21 Eng. L. & Eq. R. 53.

[12] Russell *v.* East Anglian Railway, 6 Railw. C. 501. The elaborate opinion of Lord Chancellor *Truro*, in this case, is of great importance upon this subject of the conflicting rights of creditors, having different priorities, and which in this country will be likely to become one of vast consequence, as most of our railway mortgages are so executed as to create successive equities.

[13] Collins *v.* Central Bank, 1 Kelly, 435.

creditors, and that a special permission in the charter, to mortgage for a particular purpose, did not abridge the general power.[14] A *power to purchase lands, necessary and convenient for prosecuting their works, and to dispose of the same, implies a power to mortgage them to secure the debts of the company.[15] But the mortgage must be executed, in conformity with the by-laws of the company, if any exist upon the subject, or it will be voidable on their part.[15]

10. It has been held that the power "to buy or sell real estate," and the general right to borrow money, on the part of a corporation, imply the power to mortgage its property, real and personal, to secure the payment.[16]

11. And where the company receive the benefit of the money borrowed, they cannot avoid liability upon the mortgage given to secure its payment, by denying the authority of those, who contracted the loan on their behalf.[17]

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[14] Allen *v.* Montgomery Railway, 11 Alabama, 437. The same point is reaffirmed in Mobile and Cedar Point Railway *v.* Talman, 15 Alabama R. 472. In this last case it is said, in regard to the contract of mortgage, that neither the fact, that it pledges the real and personal estate of the company, without specification: nor that the amount to be secured is not stated: nor that it is made to secure future advances: nor that no time for redemption is fixed, can, *per se*, render it invalid.

[15] Gordon *v.* Preston, 1 Watts, R. 385. So, too, a corporation, created to construct a railway, has the power to borrow money, as one of the implied means, necessary and proper, to carry into effect its specific powers. And this was held to be so, although the charter directs, that the funds shall be raised by subscription. Union Bank *v.* Jacobs, 6 Humph. 515.

So, too, the legislature having given a railway company power to mortgage or pledge their property, for the payment of loans, it was held that a deed executed under this power, assigning the company's road and all its effects, conveyed all the powers and franchises of the original corporation. Allen *v.* Montgomery Railway, 11 Alabama R. 437; Pollard *v.* Maddox, 28 Alab. R. 321. In the former of these cases, the court in giving the opinion, said, "In our judgment, the general powers of the corporation extended to the creation of a lien on all its property, without reference to the mode of creating the debt," and in the latter case, the same is reaffirmed.

[16] By the court, in Susquehanna Bridge Co. *v.* General Ins. Co. 3 Md. 305. This is but an elementary principle in the law of corporations, and requires no labored citation of cases in its support. *Ante*, § 234, pl. 12, n. 11.

[17] Ottawa Plank-Road Company *v.* Murray, 15 Illinois, 336. And a mortgage may be ratified by a subsequent board of directors. Hoyt *v.* Mining Company, 2 Halst. Ch. R. 253.

12. But the deed of the shareholders will not convey the title of real estate, which belongs to the company.[18] And by parity of reason the deed, or mortgage, of the property of the company, cannot transfer the corporate franchise, which is only made transferable, by the general principles of the law of corporations, by the transfer of the shares. And this seems to be the most difficult * question arising, in regard to those mortgages of railway companies, where their charter, or the general laws of the state, contain no special power, enabling them to execute mortgages. The mortgage, as a mortgage of property, is valid, upon the general principles of the law of corporations. But as the corporate franchises reside in the shareholders, if the mortgagees foreclose, what title do they obtain, and how are they to make it available ? " [19]

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[18] Wheelock *v.* Moulton, 15 Vt. R. 519 ; Bennington Iron Co. *v.* Isham, 19 Vt. R. 230.

[19] *Ante*, § 181. This is a subject of so much importance and difficulty, in this country at least, and so little has yet been decided in regard to it, that we would desire to speak with the utmost circumspection and reserve, and not to be understood as having formed entirely settled opinions ourselves in regard to it.

In addition to what will come more properly under another head, *post*, § 241, we must acknowledge, that while it is obvious, that the franchise of a business corporation, like a bank, or a railway, possessing important public functions, and fiduciary responsibilities, cannot, at pleasure, be assigned, without the consent of the legislature, it has not seemed equally obvious to us, that the *bonâ fide* mortgagees of the entire property, business, and franchises of such a corporation, by virtue of a deed executed without such consent, could not, by the aid of a court of equity, obtain such control over the franchise of the corporation, as to enable them to make the foreclosure of their mortgage available to them. If this cannot be done, it certainly argues a lameness, in the powers of a court of equity, of which, in its former juridical history, there has not been found much reason to complain.

In coming to this conclusion we make no account of those cases where the grantees, or assignees, of a fishery, or other similar franchise, as in the case of ferries, Briggs *v.* Ferrell, 12 Iredell, 1 ; Bowman *v.* Wathen, 2 McLean, 376, have been allowed to dispose of them, without restraint, the same as of any other property. Watertown *v.* White, 13 Mass. R. 477 ; Felton *v.* Deall, 22 Vt. R. 170 ; Fay, Petitioner, 15 Pick. R. 243 ; McCauly *v.* Givens, 1 Dana, 261 ; 1 Green, (Iowa) 498. There are cases, where there is no such extensive public trust, growing out of the grant, and by consequence, no implied obligation against a voluntary assignment. But the well-considered cases all concur, in holding, that where this does exist, the franchise of corporate action is not alienable at will. Such is the fact in regard to the general duty of municipal corporations. So also where special trusts are conferred, upon such corporations, like that " to

*13. In a recent case in New Hampshire,[20] by an act of the legislature, the Portsmouth and Concord Railway Company

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authorize the drawing of lotteries under their own supervision, for the purpose of effecting certain improvements," it was held, that this trust cannot be so exercised, as to discharge the corporation from its liability, either by granting the lottery, or selling the privilege to others, or in any other manner. Clark *v.* The Corporation of Washington, 12 Wheaton, R. 40. So as we have before seen, in section 181, in regard to railways. And we cannot regard the fact, that the franchise of one corporation is allowed to be taken, by another, by virtue of the right of eminent domain, as any argument for the voluntary alienation of the franchise.

But the case of the mortgage of the entire property of a railway, consisting chiefly of its road-bed, and the superstructure, and accessory erections, with the rolling stock, which is also, in some sense, an accessory, if not a fixture, for a *bonâ fide* debt, without which the works could not have been completed, presents certainly a strong ground for equitable interference, to the extent of the just powers of the courts of equity.

And while it is apparent, (*ante*, note 18,) that the power to convey the franchise resides in the shareholders, and in terms, is not technically transferred, by the deed of the company, unless special power has been conferred upon them, for that purpose, still the mortgage of the entire property, has so effectually trans-

[20] Pierce *v.* Emery, 32 N. H. R. 484. In this case, before the execution of the mortgage, the company owned a cargo of railway iron, subject to the lien of the United States for duties, and agreed with the plaintiff, that he might pay the duties; that the company should lay the iron on their track, and that if they did not pay the plaintiff the amount so paid by him, for duties, within a specified time, he might take up the iron, and hold it as security for the money advanced.

It was held, that the iron having thus passed into the possession of the company, the lien was gone, and could not be asserted, by the plaintiff, against the mortgagees, but that the contract was valid between the parties to it; and that if the trustees had notice of it, and assented to the existence of such a right in the plaintiff, at the time they took their mortgage, the contract would be binding in equity, against the mortgagors, and their assignees, the future holders of the bonds.

And in another case decided at the same term, Haven *v.* Emery, 33 New H. R. 66, it was held, that the rails, having been laid upon a particular part of the road, with a view to preserve the lien, and this having been known to the mortgagees, at the time they took their mortgage, the rails did not become the property of the company, until the price was paid, that being the terms of the contract by which they were delivered to the company, and that the rights of the mortgagees to any benefit from the iron thus obtained, depended upon the payment of the price, as much as those of the company. This is the case of a mortgage executed subsequent to the laying of the rails, and the notice to the trustees was held sufficient to bind the bondholders, as in the former case. See also Enders *v.* Board of Public Works, 1 Grattan, 364.

were * authorized to issue bonds, and to execute a mortgage, to trustees, to secure the payment of such bonds, "of the whole, or

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ferred the beneficial use of the franchise, that it must either operate a dissolution of the company, and a reversion of the road-way to the land-owners, (Bingham *v.* Weiderwax, 1 Comst. 509; 2 Kent, Comm. 305, 307,) or else the mortgagees be allowed to exercise the powers of the corporation, so far as its business functions are concerned; or what is equally at variance with the general law of business corporations, the entire mortgage must become practically inoperative.

The chief impediment in the way of carrying into effect railway mortgages, executed, without express power from the legislature, is not that the corporation had not the power to execute such a contract, for upon general principles, it is universally conceded, that the contract, where there is no restriction upon the company, is valid and binding upon them. And it is settled in the English law, that corporations, and especially railways and canals, may apply to the legislature for additional and enlarged powers, to enable them to carry into effect their proper functions, interests, and undertakings. *Ante*, § 181.

We see no reason, why this rule should not apply to railways in this country, since it is not an enlargement, or qualification, of the contract, that is required, but power to render available a valid contract, already existing. And as there is no question the legislature might, in granting the charter, or by a subsequent act, have given the power to execute valid mortgages, not only of their property, which exists on general principles of law, applicable to similar corporations, but of their corporate franchise also; so it must equally consist with the power of the legislature to ratify and confirm such a contract, already existing, as it is not the consent of the corporators, which is desired, so much as it is the assent of the sovereign, to the transfer of public duties, conferred upon one person, to another.

Hence there have been some decisions of the courts in this country, confirming such mortgages, executed without the consent of the legislature, on the ground of their recognition, or express ratification, by subsequent enactments of the legislature. Upon this ground was decided the case of Hall *et al.* Trustees, &c. *v.* Sullivan Railway, (United States Circuit Court for the District of New Hampshire,) before Mr. Justice *Curtis*, whose opinion may be desirable to the profession, and which is therefore inserted:—

"This is a bill in equity brought by certain citizens of the state of Massachusetts against the Sullivan Railroad Company, a corporation created by a law of the state of New Hampshire, and against George Olcott, a citizen of the last-mentioned state. It is founded on a mortgage, a copy of which is annexed to the bill, which purports to have been executed under the corporate seal, pursuant to certain votes of the corporation which are therein recited, and this mortgage conveys unto the complainants as trustees, 'the railroad and franchise of the said company in the towns of Walpole, Charlestown, Claremont, and Cornish, in the county of Sullivan and state of New Hampshire, as the same is now legally established, constructed, or improved, or as the same may be at any time hereafter legally established, constructed, and improved, from its junction with the Cheshire Railroad Company to its junction with the Vermont Centrail Railroad Company, with all the lands, buildings, and fixtures of every kind thereto belong-

a part, of *the real, or personal estate, of the corporation," and by the mortgage to give the trustees authority to sell "the real

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ing, together with all the locomotive engines, passenger, freight, dirt, and hand cars, and all the other personal property of the said company, as the same now is in use by the said company or as the same may be hereafter changed or surrendered by the said company,' Habendum to the said trustees; and 'Provided nevertheless, and the foregoing deed is made upon the following trusts and conditions.' Then follow the trusts and conditions, which will be more fully adverted to hereafter; but it should be here stated that the general purpose of the mortgage was to secure the payment of the interest and principal of certain bonds issued by the corporation, the interest whereon had become due before this bill was filed, and is unpaid. The bill prays, 1st. That the trustees may be put into possession of the railroad franchise and property conveyed by the deed, and may be directed by the court in its management and in the execution of their trust, and that the company may be restrained from intermeddling therewith. 2d. That an account may be taken of what is due to bondholders, and the company ordered to pay the same by a fixed day, and in default thereof that the company may be forever debarred and foreclosed from all equity of redemption of the mortgaged property. 3d. That a receiver may be appointed for certain purposes, which it is not necessary here to specify. 4th. That a sale may be made of the franchise and property mortgaged. 5th. For relief generally; under which last prayer the complainant's counsel, at the hearing, asked for a foreclosure by sale, instead of a strict foreclosure as specifically prayed for, provided the court should be of opinion that a foreclosure by sale would be more equitable.

"The railroad corporation has demurred to the bill; and I will now state my opinion upon the several questions which have been argued, so far as they are necessarily raised by the demurrer.

"The first is, whether the mortgage is valid, and competent to convey what it purports to convey. The objection made by the respondents is, that the grant by the state of the franchise to be a corporation, and to build, own, and work a railroad, and take tolls thereon, is attended with an obligation on the part of the company to exercise these franchises for the public benefit; that consequently the corporation cannot divest itself of its railroad and all the other necessary means of discharging its public duty; and as these franchises were confided to the particular political person, they can be exercised by that person alone, and any attempt to delegate them to others is inoperative and void, upon grounds of public policy. Many authorities have been cited in support of this position, the principal of which are, Winch *v.* The Railway Co. 13 Eng. L. & Eq. 506; S. Y. R. Co. *v.* Great N. R. Co. 19 Eng. L. & Eq. 513; Beman *v.* Rufford, 6 Eng. L. & Eq. 106; The S. and B. R. Co. *v.* The L. and N. W. R. Co. 21 Eng. L. and Eq. 319; Troy and Rut. Railway Co. *v.* Kerr, 17 Barb. S. C. R. 581; State *v.* Rives, 5 Iredell, R. 297.

"These authorities are sufficient to show, that in England the law is as the defendants assert it to be in New Hampshire. To a certain extent, it needs no authorities to show that the position must be well founded in New Hampshire. Among the franchises of the company is that of being a body politic, with rights

and personal *estate, and all the rights, franchises, powers, and privileges named in the mortgage deed, or any part thereof," and

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of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being, only the law can create; and when created, it cannot transfer its own existence into another body; nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. Peter *v.* Kendall, 6 B. & C. 703; Com. Dig. Grant, C.

"Whether, when they have been granted to a corporation created for the purpose of holding and using them, they may legally be mortgaged by such corporation, in order to obtain means to carry out the purpose of its existence, must depend upon the terms in which they are granted, or in the absence of any thing special in the grant itself, upon the intention of the legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the state. There is nothing in the particular terms of the grant of these franchises to the Sullivan Railway Corporation which expressly restrains their exercise to that corporation alone. The question, whether they can be exercised by any other person than the corporation, depending upon the public policy of the state of New Hampshire, to be deduced from an examination, not merely of this charter, but of the general course of legislation of the state on this and similar subjects, it is eminently proper that this court should, if possible, follow, and not precede, the Supreme Court of New Hampshire in its conclusions respecting this question. In the absence of any decision by that court, I should enter on an examination of it with great reluctance. In the manuscript opinion of the Supreme Court of New Hampshire, in the case of Pierce *v.* Emery, which has been produced at the bar, Mr. Chief Justice *Perley* has stated some views on this question. If it were necessary for me in this case to come to any conclusion concerning it, I should probably assent to the views there expressed, though I do not understand the question whether a corporation can mortgage its railway and its franchise to own and manage and take toll on it, came directly into decision in that case. But I do not find myself under the necessity of deciding this question, because I am of opinion that the legislature of the state of New Hampshire has so far recognized the validity of this mortgage, that it is not now to be deemed invalid as being contrary to the public policy of the state. On the 14th day of July, 1855, the legislature of New Hampshire passed an act, the title and first two sections of which are as follows."

[The two acts were here quoted in full. The first "for the purpose of enabling

further provided, *that the deed of the trustees upon such sale, should convey to the purchasers, "all the real and personal

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the company to pay its debts, and thereby to have greater power and means to provide for the public travel and transportation over its road," authorizing it to issue new stock to a certain amount, and the holders of bonds under the said mortgage, which is described by its date, to subscribe for the said new stock, and pay therefor with the said bonds under certain restrictions; and the second act, of the same date, exempting the trustees under the mortgage from personal liability, except such as they should assume by contract in case it should become necessary for them to take possession of the road, and to operate it for the benefit of the bondholders, and they should actually take possession of and operate the same. Peirce on Railways, in which this, and the next opinion, first appeared.

"By the first of these acts the legislature recognized the existence of the mortgage now in question, and confer on the corporation new powers to enable it to pay the debts secured by the mortgage, and it is expressly declared that this was done to enable the corporation to have greater power and means to provide for the public travel and transportation over its railroad. By the second of these acts not only the existence of the mortgage and the power of the trustees to take possession of the railroad, and operate it for the benefit of the bondholders are recognized, but the responsibility to be incurred by the trustees in the exercise of these powers to take possession of and operate the road, is regulated and limited. After the legislature had thus granted to the corporation new powers to enable it the better to accomplish its duty to the public by paying off this mortgage, and have interposed to facilitate the exercise of the powers of the trustees under the mortgage by regulating and restricting the personal liabilities to be incurred by them in the exercise of these powers, it seems to be impossible to maintain that the mortgage itself is void, because contrary to the public policy of the state. The will of the legislature, while acting within the powers conferred by the people of the state, constitutes the public policy of the state, and, so far from manifesting its will to have this mortgage void and inoperative, it has interfered to help out its operation, and make it more easily available as a security. I do not think a court of justice can undertake to decide that a mortgage was contrary to the public policy of the state, after the legislature has directly interposed to aid the mortgagees to act under it. I am, therefore, of opinion that this mortgage, so far as it purports to convey to the trustees the tangible property of the company, and the rights to manage and work the road, and take toll thereon, is not void as being contrary to the public policy of the state.

"The next question I have considered is, whether the trustees are entitled, upon the case made by the bill, to a decree of foreclosure, either by a strict foreclosure, or by a sale. It is insisted by the defendants that the only mode of foreclosing this mortgage is by a sale in pursuance of the fourth article; and though it is not denied that this power of sale may be executed under the direction of a court of equity, upon a bill framed for that purpose, yet it is objected that this bill does not show that a case exists for the exercise of that power; because it does not appear that the holders of two thirds of the amount of the bonds have requested the trustees to sell. The right to foreclose is incident to all mortgages

estate, named in said *mortgage-deed, together with all the rights, franchises, powers, and privileges in relation to the same,"

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save Welsh mortgages; and there is no ground for maintaining that this is a Welsh mortgage; for the conveyance is a collateral security for the bonds of the company, the interest and principal of which are payable at fixed times, and the failure to pay such principal or interest is a breach of the second express condition in the deed. Balfe *v.* Lord, 2 D. & W. 480.

"Without undertaking to say that the parties may not restrict the right of foreclosure, I consider it quite clear that the insertion of a power of sale in a deed of mortgage neither deprives the mortgagee of his right to strict foreclosure where such right would otherwise exist, nor prevents a court of equity from foreclosing by a sale made under its direction, in cases where it finds a strict foreclosure is not matter of absolute right on the part of the mortgagee, and strict foreclosure would be inequitable. In Slade *v.* Rigg, 3 Hare, 35, Sir *James Wigram*, V. C., decreed a strict foreclosure, though the deed contained a power of sale, and it was argued that the execution of that power was the only remedy for the mortgagee. In Vayne *v.* Hanham, 4 Eng. L. & Eq. R. 147, the deed contained a power of sale. The mortgagee brought a bill for a strict foreclosure. The mortgagor resisted, and insisted that the mortgagee could only have a decree for a sale. Sir *George Turner*, V. C., reviewed the case of Slade *v.* Rigg, approved it, and decreed a strict foreclosure. These were mortgages of personalty, which increased the difficulty of ordering a strict foreclosure; but that, as well as the existence of the power of sale, was held to be insufficient to confine the mortgagee to an exercise of the power of sale contained in the deed. I think the true distinction is taken in Jenkin *v.* Row, 11 Eng. L. & Eq. R. 297. It is between deeds containing a mere trust for a sale to secure money advanced, and a mortgage. The former must, of course, be executed as declared, and there the remedy stops. But if the deed be a mortgage, the right to a foreclosure arises from the nature of the security, and is entirely consistent with the existence of another right, namely, a power to sell *in pais* which the mortgagor cannot compel the mortgagee to execute. It is inserted for the benefit of the mortgagee, and he may avail himself of it or not, at his own will.

"It was argued in the case at bar, that it could not have been intended that a right to foreclose would exist, because, after foreclosure, the trustees would still hold as trustees, and so the whole matter would stand as before. It is true they would hold the absolute estate as trustees; but it would be as trustees for the bondholders, and subject to such disposition thereof as their rights and interests might require. In the case of Shaw *et al. v.* The N. C. Railway, the Supreme Court of Massachusetts had a similar mortgage before them, and held that the power of sale did not supersede the right to foreclose by bill in equity. My opinion is, therefore, that upon the case stated in this bill the trustees have a right to come into a court of equity to foreclose this mortgage. In what manner it is to be foreclosed, whether by a *strict foreclosure*, or by a *sale*, it would be premature now to decide. Whether the statute law of New Hampshire, defining the rights and method of foreclosure, so affects the right itself that only a strict foreclosure, substantially such as is there provided for, can be decreed by a court of equity, or

which the corporation had, at the *time of the mortgage, and that the purchasers should thereby *acquire "all the rights,

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whether the grant of equity jurisdiction to the Supreme Court of that state, can be considered as having affected the right of foreclosure by superadding those principles of equity respecting foreclosure, which are administered in courts of equity; or how far this court is to regard either of these considerations, and what particular method of foreclosure the principles of equity require in this case, can only be properly decided at the hearing, when the merits of the case shall be before the court upon the allegations and proofs of both parties. For the purpose of this demurrer, it is enough that upon the case, as stated in the bill, the complainants appear to be entitled to some decree of foreclosure; and, inasmuch as the demurrer being taken to the whole bill must be overruled, if the bill for any purpose is sustainable, it is not necessary to decide whether the complainants are entitled to the aid of a court of equity to put them in possession, either in the course of, or independent of, a process of foreclosure. This question, also, may best be decided at the hearing. If the complainants merely sought possession of tangible property of the company, not for the purpose of foreclosing the mortgage, but to enable them to take its profits, there might be no sufficient reason for the interposition of a court of equity. On the other hand, if they also need to be quieted, and protected in the enjoyment of incorporeal rights, the nature of the rights, and their liability to numerous interruptions and infringements, might render the powers of a court of equity indispensable to their effectual protection. See Croton S. P. Co. *v.* Ryder, 1 Johns. Ch. R. 611; Newburg S. P. Co. *v.* Miller, 5 Johns. Ch. R. 111; Bos. W. P. Co. *v.* Bos. & W. Railway, 16 Pick. 525.

"When the whole case is before the court it can be seen what the rights of the parties are, and how far and for what purposes the complainants need the aid of the court.

"The remaining question is, whether it was necessary for the trustees to make the bondholders parties. Generally, when a mortgage is made to a trustee for the benefit of a *cestui que trust*, I apprehend that the question whether the *cestui que trust* ought to be made a party, depends on the purpose of the trust. If the trustee is the proper party to receive and continue to hold the money for the benefit of the *cestui que trust*, so that the object of the suit is merely to reduce the trust fund to possession, that the trustee may hold it in trust, the *cestui que trust* is not a necessary party. For I take the general rule to be, that to a suit by a trustee to obtain possession of a trust fund, the *cestui que trust* need not be made a party. See Calvert on Parties, 212–215, and cases there cited; Allen *v.* Knight, 5 Hare, 272. But where a trustee is interposed between a lender and borrower, merely for the purpose of enabling the lender to obtain payment through the exercise by the trustee of powers conferred on him by the mortgage, and the lender is the proper party to receive the money, he should be made a party to a bill for foreclosure. It is in truth between him and the mortgagor that the account is to be taken, and he ought to be before the court for the purpose of taking the account, as well as to receive the money if paid. See Story, Eq. Pl. sec. 201.

franchises, powers, and privileges, which said corporation possessed, and the use of said railroad, with all its *property and

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"But this requirement of the presence of the *cestui que trust* must give way to the absolute impossibility, or even to the excessive inconvenience of complying with it; and the case at bar undoubtedly presents an instance of such excessive inconvenience, if not absolute impossibility. The bill shows that the number of different bonds secured by this mortgage was seven hundred and five, amounting to the sum of five hundred thousand dollars. They were not issued until after the execution of the mortgage. Of course their original holders are not parties to the deed. It is a notorious fact, and recognized in various ways by the legislation of most states where railroad corporations have issued such bonds, and manifestly contemplated by the deed in question, that these bonds were to be sold in the market and pass from hand to hand. Consequently it must have been impossible for the trustees to know who were the holders when the bill was filed. And if then known, there would be no probability that they would continue in the same hands during any considerable time. To require the trustees to make the holders parties would amount to a prohibition to sue, and it is now too well settled to require a reference to authorities, to show that courts of equity do not allow a rule respecting parties adopted for purposes of convenience and safety, to operate so as to defeat entirely the purposes of justice. Nor is this a case in which it could answer any beneficial purpose to make some of the bondholders parties in behalf of themselves and all others. The trustees are competent, (Powell *v.* Wright, 7 Beav. 444,) and it is their duty to represent all. The deed so treats them. In the cases of a sale, or possession taken of the road for the purposes of managing it, and receiving the income, the deed looks to the trustees to ascertain who are holders of bonds and to pay to each his aliquot part, and it is in the power of the court by directing the proper inquiries before a master, to have the holders of the bonds before the court at the moment when the account is to be taken, and thus afford all needful security, as well to them as to the mortgagors and the trustees. See Story's Eq. Pl. sec. 207, *a.*; Williams *v.* Gibbs, 17 How. 239; Gooding *v.* Oliver, ib. 504. It was stated at the bar, that the Supreme Court of Massachusetts came to this same conclusion in reference to parties in Shaw *v.* Norfolk C. R. R. above referred to, but that no report of the decision on that point has been made. My opinion is that the objection for the want of parties is not tenable.

"The demurrer is overruled, and the defendants ordered to answer the bill."

The case of Shaw *et al.* Trustees *v.* Norfolk County Railway, 5 Gray, is much to the same effect. The opinion of the court was delivered by *Merrick*, J.: —

"Several considerations have been urged upon our attention by the respondents, as valid objections to the maintenance of the present bill. It is insisted, in the first place, in their behalf, that a franchise created by the legislature and conferred by its authority on a particular party, cannot be sold or transferred by him to another. But if this general proposition, concerning which it is unnecessary at this time to express any opinion, should be admitted to be strictly correct, it would be of no advantage to the respondents in the present case, because their convey-

rights of property, for the same purposes, and to the same extent, that said corporation could use the same, if said deed *had not

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ance to the complainants has been ratified and confirmed by a subsequent statute, duly enacted. Stat. 1850, c. 175, § 2. Besides, by the deed of indenture recited in the bill, not only the franchise of the Norfolk County Railroad Company, but also all its real and personal property, consisting, besides other things, of lands, houses, stations, iron, sleepers, cars, and engines, was conveyed to the complainants, to be held by them in trust and as security for the payment of the bonds, which it was the purpose and intention of the corporation to issue and deliver to its creditors. And if any doubt could ever have been supposed to exist in relation to the transfer of the franchise, there certainly would have been none concerning the conveyance of the lands and personal property described in the deed of indenture. And there may be a suit as well for the foreclosure as for the redemption of lands subject to the incumbrance of a mortgage. Rev. Stat. c. 81, § 8.

"But the respondents further object that the bill cannot be maintained, because there was no such conveyance to the grantees as would in law give to them an estate absolutely upon a breach of the condition upon which it was made; and, consequently, that there was no equity of redemption in the grantors, and would be no necessity or occasion for any process to aid in effecting a foreclosure. This position is predicated upon the assumption either that the grantors are limited to the specific remedies provided for them in the deed of indenture, or that the legal effect of the deed is to create only, and nothing more than, a Welsh mortgage. But neither the one nor the other of these assumptions can be sustained. Welsh mortgages are frequently mentioned in the English books. They resemble, says Chancellor Kent, the *vivum vadium* of Lord Coke, under which the creditor took the estate to hold and enjoy it without any limited time of redemption, and until he repaid himself whatever was due to him out of its rents and profits. But they are now entirely out of use in that country, (4 Kent, Comm. 137;) and they do not ever appear to have been recognized or practically known among the modes of conveyancing which have prevailed in this Commonwealth. They cannot exist under our statute, which provides, that when the condition of any mortgage of real estate has been broken, the mortgagor and his assigns may redeem the same at any time before a legal foreclosure has been effected. Rev. Stat. 107, § 13.

"Every circumstance attending the transaction has the most manifest tendency to show that the deed of indenture executed by the respondents, and conveying their railroad, lands, and personal property to the complainants, was intended by them to be, as it in fact is, a mortgage of the granted premises. It begins with a vote of the stockholders, authorizing the directors to mortgage the railroad, franchises, and property of the company to raise thereby such sums of money as should be found necessary to complete and equip the road, and pay off all existing liabilities. In the measures adopted by the directors, they recite and profess to be governed exclusively by the terms of that vote, and in pursuance of it, they authorize and direct the president and treasurer to execute a mortgage in the name and behalf of the company. And the instrument which was executed

been made, subject to the same liabilities as to the use of said railroad, that said corporation would be under, if said deed

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under that authority was afterwards ratified and confirmed by act of the legislature. Stat. 1850, ch. 175. The deed of indenture contains in itself all the provisions, and has all the characteristics of that species of conveyance. It conveys an estate in fee to the grantees, to have and to hold the same to them and their survivors and successors, but upon the express condition that if payment of the bonds, and the interest accruing upon them shall be truly made as the same respectively fall due, the indenture itself shall thereupon become void, and of no effect. The conveyance being thus defeasible when the condition annexed to it has been performed according to its legal effect, and by means of such performance can be regarded in no other light than that of a mortgage of the estate conveyed. Erskine *v.* Townsend, 2 Mass. R. 493; Nugent *v.* Riley, 1 Metc. 117.

"And neither the right conferred upon the grantees to take possession, upon the non-performance by the grantors of the stipulated conditions, of the whole of the mortgaged property and to manage and control it, and apply the net proceeds arising from its use to the purposes of the trust, nor the duty imposed upon and assumed by them to proceed, and take possession of the premises upon the requisition of two thirds of the bondholders according to the special provisions relative to that subject contained in the deed, affects the nature and character or legal effect of the instrument itself. It was not less a mortgage than it would otherwise have been, because the grantees were invested by special agreement with an additional authority beyond what they would have possessed without it, and which they would have no right to exercise except under an express stipulation. And so long as they took no advantage and nothing has been done under it, the rights and interests of the respective parties to the conveyance, and their relations to each other were in no respect changed or affected by it. 'A power to sell executed to one who relies upon such power, and expects and intends to purchase an absolute estate, will, without doubt, pass an unconditional estate to the purchaser, though this form of conveyance is rare in this country. But while the power remains unexecuted, the relation of mortgagor and mortgagee, subsists, if that was the relation created by the instrument separate from the power.' Eaton *v.* Whiting, 3 Pick. 484.

"But this bill may well be maintained by the complainants upon another and different ground. By the contract expressed in the deed of indenture, a trust is created, to the due performance of which they have firmly bound themselves and their successors. In the discharge of the duties thus created and thus assumed, the possession, management, and control of the estates and interests conveyed to them may—and as it seems to have already—become indispensable. For the due enforcement and regulation of such a trust, ample power is found in the jurisdiction of this court as a court of equity; and the present bill is an appropriate course of proceeding to procure for that purpose the intervention and exercise of its authority."

"The bill prays for general relief as well as for a specific decree in relation to the foreclosure of the equity of redemption. And, upon the facts stated in it, and which upon the hearing were admitted to be true, we can see no reason why

* had not been made, and that the directors should have power, notwithstanding the mortgage, to sell and dispose of any of the

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the complainants ought not to be put in immediate possession of the mortgaged property, in order that the purpose for which the conveyance was made may be accomplished, and the trust created by it be properly executed. The respondents have neglected and still neglect, to pay the income, which has accrued upon a large proportion of the bonds which were duly issued, and which are held by the creditors of the corporation. These bondholders are entitled to demand the money which has become due, and it is the duty of the trustees to make use of the discretionary powers which are conferred upon them, for the express purpose of insuring the payments to which the creditors should severally become entitled. To that end, possession of the mortgaged property is indispensable, and the complainants ought therefore to have a decree by force of which they can obtain it.

"We see no ground for the suggestion, that the bill cannot be maintained because the complainants have an adequate and complete remedy at law. It is obviously quite the reverse. The nature of the property with the possession of which they seek to be invested, renders it impossible for them to find a remedy in a single suit at law. There must be, if resistance is made to their claim of possession, unless recourse be had to the equitable jurisdiction of the court, actions real in different counties as well as actions personal, besides such other and further proceedings as may be suitable to obtain the control and enjoyment of the franchise of the corporation. And besides all this, the trust is to be regulated as well as the property possessed. To control all this property, to enforce these obligations, and to preserve the rights of all parties interested, the court can only when exercising the equitable powers conferred upon it, afford a complete and adequate remedy.

"A decree properly prepared must therefore be entered on behalf of the complainants, entitling them to have immediate possession of all the mortgaged property."

See the following cases upon the general right of corporations to mortgage property. Jackson *v.* Brown, 5 Wendell, 590; De Ruyter *v.* St. Peter's Church, 2 Comst. 238; Gordon *v.* Preston, 1 Watts, R. 385.

Sutherland, J., in Jackson *v.* Brown, *supra*, says: "It would be very extraordinary if this or any other corporation had not the power to appropriate its property to the payment or security of its honest debts."

So too a release of tolls by a bridge company has been held valid. Central Bridge Co. *v.* Baily, 8 Cush. R. 319. So also the lease of a turnpike-road was held valid in Jouitt *v.* Lewis, 4 Littell, R. 160; Enders *v.* Board of Public Works, 1 Grattan, 364.

And although the remedy in the case of railway mortgages must depend upon the form of the contracts very much, there seems no more difficulty in so restraining the corporation, by proper orders, in the court of equity, as to enable the mortgagee to obtain the benefit of his contract, when executed under the general powers of the corporation, than in appointing a receiver, to distribute the receipts of the company, under the order of the court, for any other purpose, which is

*personal property of said corporation, provided they should purchase, with the proceeds thereof, other property to an equal

every day's practice, in cases of indictment, and conviction, and unsatisfied judgments, for debts, and other liabilities, and in many other instances. And it must always be done, in courts of equity, where they have an unsatisfied judgment, or debt, in that court, against the company, and no other mode of enforcing it. And there is no special hardship in requiring the corporators to respect the rights of mortgagees, which have arisen in the due course of business, and where the corporations have obtained funds thereby, through the instrumentality of agents of their creation, and by whose acts they should be bound, to the extent of their corporate interests.

And even where an absolute foreclosure is allowed upon such a mortgage, there seems no actual injustice to occur. But there is technically the superaddition of the title of the vital, and exclusive franchises, of the corporation, which was not included in the contract, as originally executed, and could not be, by the mere act of the corporation, or its agents, without the intervention of the corporators, or the legislature. It is true, that under the incumbrance, these franchises must prove but a barren form, in the hand of the corporation. But as it is technically, a right inherent in the corporators, we do not well comprehend, how it is to be absolutely foreclosed, in a proceeding upon a deed which confessedly does not include it.

It seems that it would be more in accordance with the general course of the English courts of equity, where the title to the franchise is not technically conveyed, to retain the case in that court, for the purpose of enabling the mortgagees to obtain enlarged powers, from the legislature, not inconsistent with the duties they owe the company, under the deed, and which shall go exclusively to affect the remedy. Great Western Railway *v.* Birmingham & Oxford Junction Railway, 2 Phill. 597; opinion of Chancellor, § 181, *ante*.

In the case of Goodman & Corwin *v.* Cincinnati & Chicago Railw. before the Superior Court of Cincinnati, not yet reported, the trustees of a mortgage of lands by the defendants, brought their bill in equity, asking for a foreclosure and sale of the mortgaged premises, sufficient to satisfy the arrears of interest. The court, *Story*, J., held the plaintiffs entitled to the prayer of their bill, both by the terms of their mortgage, and upon general principles of equity law, aside from any express provision in the deed. The learned judge based his opinion, of the general right of courts of equity, to order sale of the mortgaged premises, to meet the payment of any instalment of principal due, (or any arrears of interest, which he regarded as the same thing,) upon the following cases. King *v.* Longworth, 7 Ohio, 231; Stanhope *v.* Manners, 2 Eden R. 197; West Branch Bank *v.* Chester, 11 Penn. State, R. 282.

As we have before said, some courts have held the franchise itself assignable upon general principles. Mr. Justice *McLean*, in Bowman *v.* Wathen, 2 McLean, R. 393, says: "In this respect" [the assignable quality of the franchise of a corporation] "no difference is perceived between a ferry franchise, the franchise of a toll-bridge, a turnpike, or railroad, or any other franchise of the same nature," the court, at the same time, holding the ferry franchise assignable, without the aid of a legislative act.

amount, *which should be held by the trustees under the mortgage, in the same manner, as if the same had been owned by

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And in Grinnell *v.* The Trustees of Sandusky, Mansfield, & Newark Railway, in the Court of Common Pleas, in Ohio, it was held :—

"1. That a railroad company, authorized to borrow money for the construction of its road, has, as an incident to that power, and without an express grant in its charter, the power to secure such loan by a mortgage.

"2. That a mortgage of the road and its income is, in effect, a mortgage also of the franchises of the company, and upon a sale of the road under the mortgage, the franchise will pass to the purchasers.

"3. That where two or more railroad companies become united, and consolidated into one company, under the statutes of Ohio, and such original companies had, prior to the consolidation, given mortgages on their respective roads, the rights and liens of the respective mortgages must be respected and preserved, due regard being had to the consolidation.

"4. That after such consolidation, no one of the mortgages upon the original roads can be enforced by a separate sale of its original line, but all such original mortgages must be enforced by a sale of the consolidated roads, and the respective liens on the parts be adjusted in the distribution of the proceeds of the whole, upon the report of the master, so as to give each mortgage so much of the proceeds as may be estimated to arise from the part covered by its lien." Pierce on Railways, 512.

In Enfield Toll-Bridge *v.* Hart. & N. H. Railway, 17 Conn. R. 40, *Williams*, Ch. J., in giving judgment, says: "What are the rights of the plaintiffs? They are derived from the grant of the legislature, and are what in law is known as a franchise; and a franchise is an incorporeal hereditament, known, as a species of property, as well as any estate in lands. It is property which may be bought and sold, which will descend to heirs, and may be devised. Its value is greater, or less, according to the privileges granted to the proprietors." And this is but the repetition of the elementary definitions of a franchise, found in the earliest text-writers of the English common law. But in Pierce *v.* Emery, 32 N. H. R. 504, *Perley*, Ch. J., says, in regard to the rights of public railways: "They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way, which they take and hold, for the necessary use of their road." . . . "But they may contract debts, may purchase on credit, and we see nothing in the nature of their business, or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it." The same view is maintained as to the right of the railway company to create a mortgage upon itself, so to speak, without the act of the legislature, in State *v.* Mexican Gulf Railway, 3 Rob. 513.

In Arthur *v.* Commercial & Railroad Bank, 9 Sm. & M. 394, it is held, that the franchise of a railway cannot be sold or assigned, without the consent of the power which granted it. It is a mere easement not the subject of sale. If the road be sold, or assigned, the franchise does not pass with it, nor is the corporation thereby dissolved, though it might be ground of forfeiture, if insisted on by the state. State *v.* Comm. Bank of Manchester, 13 S. & M. 569.

the corporation, at the time of the execution of the mortgage, and specifically included therein."

The directors made a mortgage to trustees appointed under the act, conveying "the railroad of said corporation, together with all its powers, rights, franchises, and privileges, with all the lands, buildings, and fixtures thereto belonging, or which may hereafter thereto belong, with all the rights, franchises, powers, and privileges now belonging to, and held, or which may hereafter belong to, or be held, by said corporation, and all the personal property of said corporation, as the same now is in use by said corporation, or as the same may hereafter be changed and renewed by said corporation." And the mortgage gave the trustees power to sell the road under the mortgage, in certain contingencies, and to execute a deed, that should pass to the

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This was a general assignment for the benefit of creditors, and for the completion of the road, of all the property of the plaintiffs, including their road. The court held such assignments valid, upon general principles, when made by railway companies, and that this was valid, except, that it was indefinite, in time, and to last until the debts were paid, when the fee of the road was to revert to the corporation, and that therefore the tendency of the assignment was, to lock up the estate indefinitely; to create a perpetuity; to hinder and delay creditors; and to secure an ultimate and permanent advantage to the corporation; and was therefore void.

The charter authorized the company to hold the estate in lands, necessary for their road-bed and incidental uses, in fee-simple. And the court say: "If the estate be one in fee, we do not see why it is not the subject of assignment or sale on execution." And whether the estate in fee, or only the accruing profits, pass, by the assignment, the court did not decide, as either was sufficient to uphold the deed. And the court seem to entertain no question, that the one, or the other, did pass, by the assignment, but for the terms of the deed being against law, and on that account void.

It is also said, in this case, that whether or not a corporation, with a railway franchise attached to it, has power to convey away the railway and the franchises attached to it, is a matter between the state and the corporation, with which third persons have nothing to do. And it seems to us this suggestion is not without its force. It is certainly in analogy to other cases, where a corporation is guilty of abuse of its privileges, on the ground of which the state might enforce a forfeiture of its franchises. This is not a question which can be raised collaterally, or at the suit of one who has no direct interest in the question. The state may waive any such forfeiture, and until they do enforce it, the debtors of the corporation cannot insist upon it. See *post*, § 242. And much less should the corporation be allowed to shield itself behind the violated rights of the state, of which no complaint is made, and thus escape the legitimate effects of its own contracts.

purchasers, "all the property, real, personal, and mixed, rights, powers, franchises, and privileges of this corporation."

It was held, that although as a general rule nothing can be mortgaged, that does not at the time belong to the mortgagor:

That the statute in this case authorized the directors to make a mortgage, not only of the existing property of the road, but of the corporate rights and franchises, and of the railway itself, as an entire thing:

That the trustees under such a mortgage would hold subsequently acquired property, as an incident to the franchise mortgaged, and as an accession to the subject of the mortgage:

That the trustees under the mortgage in this case were entitled to hold personal property, acquired by the road after the mortgage, against subsequent mortgagees of the specific property, so acquired.

*14. In the Court of Appeals, in Kentucky, in the summer of 1856, it was decided, that when the statute of the state, where a loan was obtained, deprived the company of all defence, under the plea of usury, the creditors and subsequent mortgagees could not plead usury, in defence of the mortgage, given to secure the loan.[21] And in the same case, it was held that where the road

[21] First Mortgage Bondholders *v.* Maysville & Lexington Railway, 9 Am. Railway Times, No. 31. There really is no difficulty upon general principles, in allowing the mortgage of a specific thing, to carry along with it, or as incident, subsequent accessions, as the natural increase of animals, or the crops raised upon land. This is nothing more in principle than allowing the mortgagee to take the benefit of the growth of animals, or of crops, or the advance of market value. Smith *v.* Atkins, 18 Vt. R. 461. The rule of law, which forbids the sale, or mortgage, of property not *in esse*, is merely technical, and never had any existence in equity, or certainly never was generally maintained in that court. But in State *v.* Mexican Gulf Railway, 3 Rob. Louis. R. 513, it is held that a railway, where the soil upon which it is laid belongs to another, "the owners not having been expropriated," is not susceptible of being mortgaged, unless authorized by the legislature, and that future property can never be the subject of conventional mortgage.

But in a recent case before the Supreme Court, in New York, The Farmers Loan & Trust Company *v.* Attaching Creditors of the Flushing Railw. 10 Am. Railw. Times, No. 10, 20 Law Rep. 678, it was decided on argument, and elaborate examination: That the rolling stock of a railway such as cars, tenders, and locomotives, is accessory to the real estate, and passes by deed, as a fixture or necessary incident; that railway mortgages, including the rolling stock, need not be filed as chattel mortgages; and that bondholders, under a mortgage not so filed, are entitled to the rolling stock, as against judgment creditors. *Strong*, J., said: "The property of a railway company consists mainly of the road-bed, the

was built, and most of the property of the company was acquired, subsequent to the execution of the mortgage, although

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rails upon it, the depot erections and the rolling stock, and the franchise to hold and use them. The road-bed, the rails fastened to it, and the buildings at the depots are clearly real property. That the locomotives, and passenger, baggage, and freight cars are a part, and a necessary part of the entire establishment, there can be no doubt. Are they so permanently and inseparably connected with the more substantial realty as to become constructively fixtures? Railways being a modern invention, and of a novel character, we have no decisions upon this question, and those relating to and governing old and familiar subjects, do not absolutely control us, although we must necessarily resort to them as guides. Judge *Weston* well remarks in Farrar *v.* Stackpole, 6 Greenl. 157, that modern times have been fruitful of inventions and improvements for the more secure and comfortable use of buildings, as well as of many other things, which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use; so are lightning rods, which have now become common in this country and in Europe. Those might be removed from buildings without damage; yet as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by a deed as appertaining thereto. The general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents, and the common sense of the community. It may be that if an appeal should be made to the common sense of the community, it would be determined that the term 'fixtures' could not well be applied to such movable carriages as railway cars. But such cars move no more rapidly than do pigeons from a dovecote or fish in a pond, both of which are annexed to the realty. Judge *Cowen* admits, in Walker *v.* Sherman, that a machine, movable in itself, may become a fixture, from being connected in its operations, by boards, or in any other way, with the permanent machinery. It results from many cases that it is not absolutely necessary that things should be stationary in any one place or position, in order that they should be technically deemed fixtures. The movable quality of these cars has frequently, if not generally, induced the opinion that they are personal property. Hence, railway mortgages of rolling stock have, as I understand, been generally filed in the offices of the clerks of all the towns through which the roads pass. That was undoubtedly the more prudent course, as it saved any question as to the character of the property. Even the learned counsel for the plaintiffs has gone no further than to denominate the cars '*quasi*' fixtures. Public opinion, however, although respectable in matters of fact, is an unsafe guide as to legal distinctions.

"That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can, of course, be no doubt. Their wheels are fitted to the rails; they are constantly upon the rails, and except in cases of accidents, or when taken off for repairs, nowhere else; they are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose; they are not like farming utensils, and possibly the machinery in factories and many

such property could not be held at law, it might be in equity, and a foreclosure was accordingly allowed, in regard to the subsequently acquired property.

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of the movable appliances to stores and dwellings, the objects of general trade; they are permanently used on the particular road where they are employed, and are seldom, if ever, changed to any other. Many of these are strong characteristics of the realty; some of them have often been deemed conclusive. In Lushington *v.* Sewell, 1 Sim. 435, 480, Vice-Chancellor *Hart* was inclined to think the devise of a West India (real) estate passed the stock of slaves, cattle, and implements, because such things are essential to render the estate productive, and denuded of them it would rather be a burden than a benefit. The reason assigned appears to be sound; but the vice-chancellor carried the doctrine further than the cases would warrant, as slaves, (in the West Indies) cattle, and implements of husbandry were objects of general commerce. In the case of The King *v.* The Inhabitants of St. Nicholas, Gloucester, 262, (cited by Judge *Cowen*, 20 Wendell, 269,) it was decided that a steelyard, being in a machine-house, was a fixture. Lord Mansfield said: "The principal purpose of the house is for weighing. The steelyard is the most valuable part of the house. The house, therefore, applied to this use, may be said to be built for the steelyard, and not the steelyard for the house." Surely this reasoning is equally applicable to the cars on a railway. The railway is constructed expressly for the business to be done by the cars, and what evinces their essentiality in a strong point of view in this case is, that there can be no tolls, which are expressly mortgaged, without them. It is remarked by Mr. Dane, in his Abridgement, (vol. 3, p. 157,) that certain articles were 'very properly a part of the real estate and inheritance, and pass with it, because not the mere fixing and fastening to it is alone to be regarded, but the use, nature, and intention.' Judge *Weston*, in the case which I have cited from 6 Greenleaf, in speaking of a saw-mill said, 'if you exclude' (from the realty,) 'such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated and incomplete, and insufficient to perform its intended operations.' Surely all this would be true of a railway, for it is nothing without its locomotive vehicles. It is true that no mechanical or agricultural business can be carried on to much extent, without tools or farming implements, and such tools and implements are universally conceded to be personal property; but then such tools or implements are not peculiarly adapted or confined to any particular establishment, but may be used upon them generally, and are subjects of frequent barter. It is different, I admit, as to the stationary machinery in a factory, and articles of a similar character in a dwelling-house, which are not absolutely fastened, but although they are considered as personal property for reasons peculiar to them, and not of universal application, yet, such reasons do not seem to me sufficient, while many things become fixtures without physical annexation.

"If railway cars were used in any other place than upon the lands belonging to the company, or for any other purpose than in the execution of its business, or were constructed in such shape, and so extensively, as to become objects of general trade, or were not a necessary part of the entire establishment, I might consider myself as compelled by the weight of authority to decide, that, as they are not

15. In an important case,[22] where the subject seems to have received a very patient and understanding consideration, by counsel, and by the chancellor, it is held, that a mortgage of a canal, described by its extreme termini, with all the accompanying works, executed by virtue of a general power in a statute for that purpose, conveyed the entire canal, when completed, although a portion of it was constructed upon land acquired, after the execution of the mortgage, and was built after the date of the mortgage; and that the feeder of the canal passed by the mortgage, as part and parcel thereof.

16. In a very recent case, before the Circuit Court of the United States, Mr. Justice *McLean* in the course of his opinion assumes, that railway mortgages may be so drawn as to bind the subsequently acquired property of the company; that the franchise of operating the road, and taking toll, or fare, and freight, passes by the mortgage, and may be sold under the mortgage,

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physically annexed to what is usually denominated real estate, they must be deemed personal property; but as each and all of these characteristics or incidents are wanting, the considerations which I have mentioned, or to which I have alluded leading to an opposite conclusion, require us to determine that they are included as fixtures or necessary incidents in a conveyance of real estate. In thus deciding, we shall unquestionably carry out the intention of the parties, as it could not have been the design of such parties—certainly not of the mortgagees, that the security should be diminished by the wear and tear of the machinery, and the inevitable accidents to which it is subjected. Possibly the substituted machinery might not be included in the mortgage, if it should be deemed personal property, and few, if any, would be willing to loan their money upon such an uncertainty, but it would be otherwise if the additions should be considered as made to the real estate."

This opinion is certainly plausible, and it is impossible to say, that the views, here maintained, will not, or may not, ultimately prevail. There is no doubt justice and convenience in such a view. But it seems to us somewhat of a departure from the general law of fixtures in this country, and at variance with generally received notions upon that subject, at present, when carried to the extent of declaring the rolling stock of a railway a fixture. As between the mortgagor and mortgagee, and all subsequent incumbrancers having knowledge of the prior deed, there is no difficulty, in allowing the rolling stock of a railway to constitute part of the mortgage of the road, and thus to include the renewals of such stock from time to time, and even additions. But it is not easy to comprehend how a locomotive engine and train of cars is any more a fixture than any other machine operated by steam, or than a stage-coach even. But see *post*, n. 23, 24.

22 Willink *v.* Morris Canal and Banking Co. 3 Green's Ch. R. 377. It is here said, that the grant of the power to execute a mortgage, implies a mortgage with all its incidents, including the power of sale.

containing a special clause to that effect: that the power of sale contained *in the mortgage does not preclude the trustee, from coming into a court of equity, to obtain a foreclosure of the title of the mortgagor, and sale: that the suit is rightfully brought in the name of the trustees, without joining the bondholders: that the appointment of a receiver in such cases, is matter of discretion with the court of equity: that it is not matter of course, upon default of payment of interest; but must depend upon the question of the safe and prudent management of the property, by the company, and the probability of the interest being speedily liquidated.

It was further said, that where an expenditure has been made of the current income of the road, and considerable debt incurred in completing the road and equipping it, under the advice of the trustee and a considerable number of the bondholders, such use of the funds will not be considered a misapplication. As it greatly increased the security of the bondholders, and added to the profit of the road, these facts, under the circumstances, do not authorize the appointment of a receiver.

The case was retained, under an order, that the company should make return to the court, of the amount of their net earnings, one half of which should be applied, to the extinguishment of interest, and the other half, to the floating debt of the company. But if at any time it shall appear, that the company disregard the order, or is becoming insolvent, a receiver will, at once, be appointed.[23]

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[23] Williamson, Trustee, *v.* New Albany and Salem Railway, U. S. Circuit Court, at Chambers, Cincinnati, October 26, 1857, Am. Railway Times, Vol. 9, No. 37. We here give the opinion, so far as the points of law are discussed, by the learned judge.

"The case made in the bill is the failure to pay the interest on the bonds in February last, and the embarrassed condition of the company.

"It seems to be considered that a receiver will be appointed, as a matter of course, under the mortgage, where a default has occurred in the payment of any part of the interest or principal. If this be so, the chancellor, in such a case, can exercise no discretion. He can do nothing less than carry into effect the conditions of the bonds.

"It is not the province of chancery to enforce penalties, but to relieve against them. It is asked, may the court disregard the contract of the parties? Certainly not. But where there is a hard and unconscionable contract, a court of equity will withhold its aid and leave the party to his remedy at law. An indi-

The case does not show whether the mortgage was executed, by virtue of a power, conferred by the legislature. But it is be-

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vidual promises to pay on a certain day, $1,000, and in default thereof, to pay $2,000. Would not a court of chancery relieve from this penalty? And the payment of the penalty is the contract of the party. What penalty could be more disproportionate to the default, than the one under consideration. A failure to pay any part of the instalment of interest, subjects the company to the immediate payment of several millions of dollars, not payable except under the default, for many years; and the same default subjects property, to the amount of several millions, to a sale at auction on a short notice.

"The appointment of a receiver, when directed, is made for the benefit of all the parties interested, and not for the benefit of the plaintiff, or of one defendant only. 2 Story, Eq. § 829. The appointment of a receiver is a matter resting in the sound discretion of the court. Skipp *v.* Harwood, 2 Swanst. 586.

"In such cases courts of equity will pay a just respect to the legal and equitable rights and interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver, unless the facts averred and established in proof show that there has been an abuse or a danger of abuse on his own part. For the rule of such courts is not to displace a *bonâ fide* possessor from any of the just rights attached to his title, unless there be some equitable ground for interference. Tyron *v.* Fairclough, 2 Stuart, 142, 2 Story's Eq. § 835.

"It is true that the parties in the contract, under consideration, agreed that a default in the payment of any part of the interest or principal, when payable and demanded, should incur the penalty sought to be enforced. Yet, when the aid of a court of equity is invoked, it will look into the facts, and exercise an equitable discretion. And if the party claims and attempts to exercise the powers given him in the contract, which, under the circumstances, are unjust and ruinous, he may be enjoined.

"Has there been any abuse of their powers, or a misapplication of their funds by this company, which authorizes the appointment of a receiver?

"This step is asked to be taken by the bill, with the view of selling the entire road, and all its appurtenances, for the benefit of the bondholders.

"The interest due in February last has not been paid, and since that time another instalment of interest has become due, which has not been paid. All previously accruing instalments of interest were paid or satisfactorily arranged. And the late large outlay for the completion of the road and its equipment was not only approved by the complainant and many of the bondholders, but they urged the president of the company to go on with the work by all means, and finish and equip the road, so as to increase the revenue, and they agreed to receive bonds in payment of the interest then due.

"Under the influence of this encouragement, it seems the company prosecuted the work and completed the road, which is now in successful operation. In this way, as appears from the affidavits, was every dollar of the floating debt complained of created. It went to increase the security of the bondholders by adding to the value of the road, and increasing the tolls for the payment of the interest

lieved the general statutes of Ohio allow such contracts, and the opinion certainly confirms the general views, we have taken upon

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and principal. But this is now insisted on as a misapplication of the funds of the road, which not only authorizes, but requires the appointment of a receiver.

"But this does not, in my judgment, evince bad faith on the part of the company, but, on the contrary, it showed a laudable desire to save the bondholders, and all the parties interested from loss.

"Had the road been in the hands of a receiver, no chancellor fit to deal with these subjects, it appears to me, could have hesitated to order the receiver to do, in this respect, what the company has done. In the deed of trust it is specially provided that the trustee, if he take possession of the road, shall make repairs, additions, &c. and an offer is now made to pay this floating debt, so far at least, as laborers are concerned, if the road be given up by the company. Whether the debt be due to laborers on the road or to others, is not material, seeing it was incurred under the urgent request of the trustee and several of the bondholders, and for the preservation and life of the road.

"When property is purchased and placed upon the road, no lien being taken by the seller, it becomes subject to the mortgage lien on the road, so that it is not liable to an execution, except under the mortgage; and existing liens on the road, under the mortgages, can only be adjusted by a court of equity.

"But it is said the complainant and a part of the bondholders had no power to authorize the new expenditure in the completion of the road. Such an authority as was exercised will be respected and sustained by any chancellor, at least so far as to relieve the company from any penalty or charge of misapplication of the funds of the road.

"By what authority does the complainant sue in this case, and claim a right to have equities adjusted between parties who claim conflicting interests? But in a matter of this kind, so essential to the interests of the bondholders, there can be no difficulty in sustaining the company, as above stated. But still the default is admitted, and the failure to pay occurred under the circumstances stated; and the question now is whether this default requires the appointment of a receiver, and a discontinuance of the agency which now controls the road; and this is to be done preparatory to the sale of the entire property of the road.

"The bonds will not be due and payable for many years. They who made the loans looked to the interest, and the ultimate payment of the principal.

"This procedure involves some fourteen or fifteen millions of property, the property of the railway and of the bondholders. Care should be taken in this case, as in all others, to administer equity, if possible, without a sacrifice of property.

"From the exhibits in this case there is a reasonable probability that, in the course of a short period, a vigorous operation of this road may enable its directors to pay the deferred interest and their floating debt; and the discharge of these will make the payment of the current interest on its bonds easy out of the net profits.

"If there were no other interests involved than that of the bondholders, such a course is so strongly recommended, by equitable considerations, that no intelligent holder of such securities should object to it. The floating debt has accrued

the subject, both as to the extent, and the form of the remedy; and in both particulars, it receives strong confirmation from the

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under circumstances which give a strong claim to the company for some indulgence in the payment of the deferred interest, since the completion has added so much value to the security of the bondholders, and increased the profits of the road; and, especially, as the work was done on the recommendation of the complainant, and a part of the bondholders.

"So far as the conduct of the company has been developed, in this somewhat informal examination, it is entitled to the highest commendation for its firmness, energy, and success, in the accomplishment of this great work.

"There is a strong probability that in a very short time the road will be in a condition to meet its engagements under the mortgages, which is all the bond-creditors have a right to demand.

"No change of agency could increase, I am convinced, the efficiency of that already employed on the road. A sale of the property would in all probability sacrifice the stock of the road amounting to between two and three millions of dollars, and more than half if not two thirds of the property of the bondholders. It might enable some one or more persons to purchase the road at an almost nominal consideration. These consequences, I admit, are not to stand in the way of an equitable right, enforced under circumstances of fairness and justice. But if such results may be avoided by a short postponement of the interest, and under a prospect of a speedy payment, I hold myself authorized to do so under the facts above stated.

"But I will afford to the bondholders every reasonable assurance that can be required. I will admit an order to be entered that the motion of the complainant for the appointment of a receiver be denied, and that the said company, from and after the first day of January next, set aside, one half of the net earnings of the road, for the payment of the interest of the bonded debt of said company—the other half to be applied to the payment of the floating debt of the company—a report of the gross and net earnings to be made to the court monthly by the secretary of the company; that is for the month of January, and at the close of the succeeding months, so soon as the returns can be received and made out—half of the net earnings be paid into court for the bondholders. The company will report, also, in the court, how the net earnings have been expended from the 1st of November to the 1st of January aforesaid.

"But nothing in this order is to be understood as preventing the plaintiff from renewing his motion for a receiver at any time prior or subsequent to said 1st of January, upon any new statement of facts which he may be able to present.

"The interest payable on demand. If the bringing of the action be considered a sufficient demand, the coupons must be presented and filed, if payable to bearer, before payment will be ordered."

In the case of Ludlow *v.* Hurd, in the Superior Court of Cincinnati, the subject of the right of general creditors to levy upon the furniture and rolling stock of a railway, as against prior mortgagees, is very learnedly and sensibly discussed, by *Storer*, J.

In this case the deed was fully authorized by the general statutes of the

elaborate, and thorough opinion, of Mr. Justice *Curtis*, which we have given in note (20) of this section.

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state, and in terms included all the property owned by the company, at its date, "or thereafter to be acquired and owned by said company." The defendant having recovered judgment against the company, levied upon the furniture of their business offices in the city of Cincinnati. This was an application in equity for an injunction against defendant proceeding in the levy and sale of the property, on the ground that it being necessary for the enjoyment of the road, passed under the mortgage, although not in existence at the time of its execution.

The opinion of the learned judge is of so much interest to the profession, at this time, that they will require no apology for the insertion of an extract, in regard to the state of that portion of the property of a railway, which although not strictly a fixture, is an indispensable accessory to the available use of the road.

"Where a railway company is authorized, by law, to mortgage its whole corporate property, which includes not merely its road bed, and the structures connected with it, but all its rights and franchises in addition, a conveyance, by such terms, must comprehend the power to reconstruct or repair the road, by all the means necessary to accomplish the purpose. Whatever is added to the original structure becomes a part of it, and cannot be severed from it; and if the security by the mortgage is to continue to be of any value during the period that must transpire before the bonds become due, it must depend upon the implied covenant of the company to keep it in running order, and thus earn the necessary sums to discharge the accruing interest, and, eventually, indemnify the creditors for the principal debt.

"By the transfer to the plaintiff, we must hold, then, that a paramount right to all additions made to the railway subsequent to the date of the deed was vested; that the plaintiff could, at any time, when interest was unpaid, take possession of the subject, which will include every species of property then owned by the company, as attached to, or incident to the road itself. If the right to the possession exists, then the right to protect the property from sale necessarily follows; and the plaintiff may ask us to aid him by injunction. The question, in such a case, is, 'Who has the better right, in equity, to call for the legal estate, or the legal possession?' and if the equitable owner of the incumbrance has done enough to perfect his equitable title, he has the better right. Langton *v.* Horton, 1 Hare, 560, 562; Newland *v.* Paynter, 4 Myl. & C. 408.

"The Supreme Court of New Hampshire, in Pierce *v.* Emery, 32 N. H. 484, have decided the direct question before us, though the case is somewhat involved. In New Jersey, Willink *v.* Morris Canal and Banking Co. 3 Green, Ch. 377, it was held that a transfer of the canal property carried with it all subsequent additions to the subject.

"In the late case of Phillips *et al. v.* Winston, not yet reported, but of the opinion in which a copy has been furnished to us, the Court of Errors of Kentucky have adopted the same rule, and decreed a perpetual injunction against the intervening creditor, who had levied upon property acquired by the company subsequent to their mortgage; and a similar construction is given by Judge

In regard to the bill being brought in the name of the trustees, without joining the bondholders, there can be, we think, no just

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M'Lean in the case of Coe, Trustee, *v.* Pennock and others, decided at the July term of the Circuit Court for this district, reported in the Am. Law Register, for November, 1857, p. 27.

"We have been referred to a clause in the deed of trust which authorizes the mortgagors to dispose of any part of the property that may not be necessary to the use of the road; and, it is urged upon us, that this power thus reserved is inconsistent with the estate granted by the deed itself, and must, therefore, defeat it.

"It may, in many cases, be a very suspicious circumstance, when such a permission is given by the mortgagee; as, for instance, where a stock of goods, or articles of ordinary consumption, are pledged absolutely, and the title is consequently vested in the mortgagee; the liberty reserved to the mortgagor to sell, might well furnish, if unexplained, an implication of fraud in the contract; but where, from the nature of the property pledged, it is indispensable that many portions of it should, from time to time, be repaired, reconstructed, or renewed, there can be no impropriety in permitting the party who is bound to keep up the road, and provide all things necessary to its use, to dispose of the old material, either in part payment of new appliances, or for its general preservation.

"By this permission no one can be defrauded, and no rule of law is violated. The recording of the mortgage advises the public that the company have pledged their property, and it seems to us that the license to sell it, as limited in the deed, confers no greater right than the mortgagors would have had, if no such clause were inserted. A broken locomotive, a worn-out rail, the timber necessary to repair the road-bed, require to be protected from injury, and made available for the purposes of the pledge; hence, the mortgagor may well be the agent of the parties interested in the security to see that their property, however useless, is not totally lost, and a power to sell, if necessary to effect that object, might be inferred from the relation of the parties to each other.

"The question how far the property and franchise of a railway company, or any similar corporate body, may be subject to sale by execution, has been frequently discussed and determined of late years, both in England and the United States. It is settled, we suppose, definitely, that the franchise, which includes the right of toll, cannot be levied on and sold, unless the legislature, who granted it, assent to the transfer. This was decided in The State *v.* Rives, 5 Iredell, 267.

"It is the rule adopted by the Supreme Court of Pennsylvania in Ammant *v.* The New Alexandria and Pittsburg Turnpike Road, 13 Serg. & Rawle, 212; in Leedom *v.* Plymouth R. R. Co. 5 Watts & Serg. 266; and in Susquehanna Canal Co. *v.* Bonham, 9 id. 27; in Massachusetts, in Tippetts *v.* Walker, 4 Mass. 596; in Kentucky, in Winchester and Lexington Turnpike Company *v.* Vimont, 5 B. Monroe, 1.

"In Ohio the point was fully examined and decided in Seymour *v.* Milf. and Chillicothe Turnpike Company, 10 Ohio, 476.

"The result is very clearly stated in the very accurate and learned treatise on

ground, for any difference of opinion, upon the proper application, of the most familiar principles of equity law.

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the Law of Sheriffs and Coroners, by Mr. Gwynne, p. 341. 'The right of taking toll is a franchise, and is not, at common law, nor by the statute of Ohio, regulating judgment and executions, subject to levy on execution; it may be reached in chancery.'

"And the rule thus established is not confined to the franchise merely, it covers every case where it is attempted to separate the structure of a railway or turnpike road, in parts, by a seizure on execution. The whole work is regarded as an entire thing, and each portion so dependent upon every other that the integrity of the fabric, from its commencement to its terminus, will be preserved.

"Thus it is said in 13 Serg. & Rawle, 212, already cited, 'The inconvenience would be excessive if the right of the company could be cut up into an indefinite number of small parts, and vested in individuals.' Such a course would defeat the object of the incorporation, both as respects the stockholders, and the public also, who have a very material interest in the preservation of every important thoroughfare, as they derive daily benefit from its use. We must regard, then, not among the least of the considerations which very properly press upon us, in examining a question like this, the public right and the public advantage. So long as a highway, similar to the present, can be kept up, it is required by the public interest that it should be. When, however, the corporate body becomes so involved in debt that it cannot longer fulfil the object for which it was created, a court of equity should interfere, take possession of the whole property and wind up the concern. This is not only the course indicated in kindred cases, but it is peculiarly fit where creditors and debtors, with their varied interests in a common fund, are to be protected by an equal division of the assets, according to the priority of their liens.

We have referred to this view of the case to illustrate, more fully, the rule we should adopt, in examining the questions submitted by the pleadings.

"We cannot now determine whether the property levied on is essential to the business of the company, upon the principles we have laid down. It may be that there has been extravagant expenditures in the furnishing of the apartments occupied as offices; it may be that economy has been ignored, and the fashion of the day, in the outlay of money, has been adopted; it may be that the old rule '*utere tuo ut alienum non lædas*,' has been forgotten; and it is our duty, if either the one or the other of these conditions exist, to see that the evil, for it is one, is corrected.

"No company has the right to permit its agents to pervert the corporate funds from their legitimate purpose, by providing unnecessary or costly offices, or office furniture, for their subordinates. Such an assumption is equally improper, as would be the lavish expenditure of their income, in the payment of salaries disproportioiate to the labor performed, or distributing it among an army of *attaches* and dependants, who may be all the while consuming the substance of the corporation at the expense of those who have paid up their stock, or loaned money upon their bonds.

"There must be a reference to a master to examine the property levied on,

In regard to the right of foreclosure, that must depend upon the provisions of the deed. But if it be technically a mortgage, it will entitle the mortgagees to foreclosure, whether it contain a power of sale or not, that being but a cumulative remedy.

If it be what has been called, a Welsh mortgage, or *vivum vadium*, or a provision for liquidating the debt, out of the avails of the property, the more appropriate course will be, the appointment of a receiver, or transferring the road into the power and control of the trustees, for the benefit of the bondholders, subject to accountability, before the courts of equity.

In another case[24] in the United States Circuit Court for the

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and report, immediately, whether the same, on the principle indicated by the court, is necessary to the operation of the road; and if any part thereof can be disposed of, without injury to the company, to describe it.

"Until the coming in of the report no further order will be made."

[24] Coe, Trustee, *v.* Pennock & The Cleveland, Zanesville, & Cincinnati Railw. July Term, 1857, Law Register, Vol. 6, p. 27. We insert the opinion at length, as it comes from a judge of large experience, and great practical good sense, upon a subject of vast importance to railway companies, and to capitalists.

"But it is not necessary to consider, at large, whether the mortgage in question, in regard to the equipments of the road acquired subsequent to the date of the mortgage, is operative at common law; as, if it cannot be so considered, there can be no doubt it is good in equity, and the question comes before us on a bill in equity. It seems to be admitted, as it is not denied, that the future profits of the road are subject to the mortgage. And what difference in principle can there be in the future profits, and the necessary expenditure to produce such profits? Repairs, when necessary, of the rolling stock on the road, are not more within the mortgage than the purchase of the necessary supplies of such stock, as the public accommodation shall require. The mortgage was on a railway in full operation, embracing every necessary equipment and accommodation to give to it the utmost efficiency. This entered into the consideration of the parties to the mortgage, and any thing short of this, would, in a great degree, impair the security of that instrument.

Suppose a sheriff or constable had levied upon one or more of the passenger cars or of the locomotives, within a few days after the machinery on the road was in motion; can any one suppose that the mortgage could have been defeated or its security impaired by such a step. Will it not be said that in such a case the stock would be within the protection of the mortgage; this no one could doubt, as a withdrawal of the stock from the road would not only impair the obligations of the mortgage, but defeat its object. In this respect, a railway in operation must be considered as protected in the capacity in which it was mortgaged; and this is so manifest that the public, and especially subsequent creditors, are bound to know it. But the protection by the mortgage of the equipments upon the road, in the case supposed, are not more indispensable than to

northern district of Ohio, before the same learned judge, the following points were decided, wherein the same questions, to some extent, are further illustrated.

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keep them in repair, replace them when destroyed, or add to them when required by the public exigencies; these are all within the purview of the mortgage, the contemplation of the parties, and known to the public.

"Does this view impose any hardship on the manufacturer of a part of the equipments, subsequent to the date of the mortgage? Certainly it does not. He has a right to retain the possession of his work until it is paid for or the payment secured. Having delivered possession to the company in the ordinary course of business, without receiving the payment, he can assert no lien upon it either in law or equity; he stands in relation to the company on a footing with other creditors who have no security for their debts.

"In Mitchell *v.* Winslow *et al.* 2 Story Rep. 639, Mr. Justice Story says, 'Courts of equity give effect to assignments, not only of choses in action, but of contingent interests, expectancies, and also of things which have no actual or potential existence, but rest in mere possibility only.' In respect to the latter, it is true, the assignment can have no positive operation to tranfer *in præsenti*, property in things not *in esse;* but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come *in esse;* and it may be enforced as such a contract *in rem*, in equity. The same doctrine is laid down by Lord Hardwicke. Also, it was so held in Hobson *v.* Travor, 2 P. Williams, 191; Carleton *v.* Laighton, 3 Meriv. 667; 5 M. & Selw. 228; Curtis *v.* Auber, 1 Jacob & Walker, 512, 526; 1 Mylne & Keen, 488; Langton *v.* Horton, 1 Hare, 549; Mitford *v.* Mitford, 9 Ves. 100. In his Equity Jurisprudence, § 1231, Mr. Justice Story says: 'In equity there is a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers and have notice. For it is a general principle in equity, that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust.'

"The mortgage having been placed upon record in the three counties through which the road was to be constructed, and was in fact constructed, I suppose it must operate as a notice of its contents. See Hawthorn *v.* Newcastle and North Shields Railway Company, reported in Cross on Liens, Appendix, 408; Abbot *v.* Goodwin, 20 Maine, Rep. 408; 2 Appl. & Shep. 408; Macomber *v.* Parker, 14 Pick. 175.

"The third ground assumed is, 'that the trust deed is void for uncertainty as to the nature and extent of the grant.'

"The instrument has been attentively read and considered, and no uncertainty is perceived in its conditions, or as to the objects on which it is to operate. If its language were so vague as not to specify these matters with at least reasonable certainty, the mortgage could not be specifically enforced. But as this objection does not seem to arise on the face of the instrument, and has not been shown in the brief of counsel, no further examination will be given to it.

A mortgage given on the entire property of a railway, including future receipts for transportation, with an agreement that

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"In the fourth ground, it is contended that the mortgage is void under the statute of frauds.

"As the trust deed was entered into under the enactments of the legislature, it certainly cannot be said to be against the policy of the law; and it is not perceived that any of its provisions conflict with the statute of frauds, seeing that they are authorized by a law subsequent to that statute.

"In the fifth and last ground it is contended, 'the plaintiff does not show himself entitled to call upon this court to stay the hand of the judgment creditors.'

"The first mortgage to the complainant Coe, was dated the 1st of April, 1852; the second to the same individual bears date in March, 1855.

"Prior to the execution of the second deed of trust to the complainant, a mortgage similar to the one first executed to the complainant, was given to George Mygott, by the same company and on the same road, its equipments, &c. dated 1st of November, 1854, to secure the payment of bonds to the amount of seven hundred thousand dollars, which it was proposed to issue for the completion of the road, &c.

"It appears that the company employed P. F. Geisse to build for its use on the road, a number of cars of different descriptions; and that in payment of the balance of his account, on the 20th November, 1854, he received sixteen of the second mortgage bonds secured by the trust deed given to George Mygott. The judgment complained of, was obtained on these bonds by Pennock and Hart.

"As the first mortgage of the complainant was executed the 1st of April, 1852, it is contended by the defendants' counsel, that the first mortgage cannot avail him, as to the two locomotives, the Hercules and Vulcan, and the passenger cars 3, 4, 5, and 6, none of which were in existence until the fall of 1853, and the spring of 1854. And that before the execution of the complainant's second mortgage, in March, 1855, this property had been conveyed to George Mygott, by the trust deed dated November 1st, 1854, to secure sundry bonds, of which the sixteen on which the judgment was entered, formed a part.

"This argument rests upon the hypothesis, that as the two locomotives and passenger cars referred to were received by the company after the date of the first mortgage, and before the second mortgage was given to Mygott, and as the bonds on which the judgment was obtained, were secured by the second mortgage, the complainant can claim no lien on this property under his first mortgage.

"The passenger cars and the locomotives referred to, were in possession of the company and employed upon the road, some months before the mortgage was executed to Mygott.

"It appears that Geisse, before he received the sixteen bonds, had taken from the company a draft for the amount due, on New York or some other place, which was returned protested for nonpayment. On the return of the draft, the bonds were paid to him as the only means of payment, within the power of the company. From this statement it is clear, that the defendants Pennock and Hart, as

property on the road subsequently acquired, shall be bound, and a conveyance of it be duly executed, gives an equitable lien on

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creditors of the company, stand upon no other ground and have no higher claim than any other holders of bonds issued under the second mortgage. Geisse the builder of the cars, having delivered them to the company, without taking a special lien, if he continued to be the holder of the bonds, would have no better claim than the defendants, who are his assignees. The bonds, it is presumed, are payable to bearer, and pass by delivery. Pennock and Hart are purchasers in the market, the same as other holders of bonds, covered by the second mortgage.

"A part of the gravel cars levied on by the sheriff were sold, with the consent of the counsel in this case, and also of the complainant and the first bondholders; but the levy is understood still to include cars, &c. which belonged to the company when the first mortgage was given.

"In the first mortgage, for the consideration stated, the company covenanted to 'execute and deliver any further reasonable and necessary conveyance of the premises, or any part thereof to the party of the second part, his successors in said trust, and assigns for more fully carrying into effect the objects hereof, particularly for the conveyance of any property acquired by said parties of the first part, subsequently to the date hereof, and comprehended in the description contained in the premises.' It is presumed the third mortgage deed to the complainant was executed in 1855, under this covenant. Entertaining the opinion that the first mortgage, by virtue of the above and other covenants which it contains, operated as an equitable mortgage on subsequently acquired equipments for the road, which was not displaced by the second mortgage, it is not deemed necessary to inquire what, if any, legal effect can be given to the last mortgage. Povey *v.* Brown, 14 Conn. 255:

"It is alleged in the bill, that the entire property of the road, will be inadequate to the payment of the first mortgage. The wisdom of the first bondholders was manifestly shown, by permitting the road to remain under its present management, being satisfied that the directors had discharged their duties faithfully and economically. This seems to be the only course that can retrieve the affairs of the company. In most cases, to place such a concern in the hands of a receiver, involves it in hopeless ruin.

"Had Pennock and Hart, as holders of the sixteen bonds, a right to bring suit on them at law, and having obtained a judgment, to sell on execution a part of the mortgage property, without reference to the claims of other creditors under the same or other mortgages? Against such a procedure there are three insuperable objections: 1. A sale on execution would convey to the purchaser no exclusive right to the property sold. 2. Such a sale would not divest the equitable rights of other bondholders. The purchaser could receive only the same and no greater right, than that which was vested in them by the bonds. 3. The claim must be prosecuted in equity, where all who have an interest in the subject-matter, may be made parties. In equity only can the rights of all the parties be properly adjusted. And this is especially the case where the property mortgaged is inadequate to the payment of all the creditors. In addition to these considerations, from the nature of the property levied on, it could not be separated from

property subsequently acquired, to the bondholders of bonds secured by the mortgage.

A charter must be construed according to the intent of the legislature; if such intent can be ascertained, by the language used.

A person who constructs cars, or other rolling stock, for a railway, if he deliver the stock to the company, without any special provision therefor, can claim no lien on the work. He may effect this lien while the work is in his possession. And if he obtain a judgment against the company for the work, an execution cannot be levied on the rolling stock on which a former lien exists.

Where there are liens on the property of a railway company, the liens must be adjusted in chancery, where each claimant shall receive his proportionate share of the proceeds. The appointment of a receiver is generally ruinous, and a sale of such

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the road, without suspending, in whole or in part, its operations. And what could be more unjust than this, to the other bondholders? The operation of the machinery on the road, in the transportation of passengers and freight, constitutes its chief value.

"The railway, like a complicated machine, consists of a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on and abstract some essential part from Woodworth's planing machine, or any other combination of machinery, as to take from a railway its locomotives or its passenger cars. Such an abstraction would cause the operations to cease in both cases. As before remarked, the proper mode of enforcing payment against a railway company, on bonds secured by mortgage, is, to bring the creditors and the railway company into chancery, where the earnings of the road, through a faithful agency, may be distributed equitably among the creditors. And in a case where such a course would not satisfy the reasonable demands of creditors, to sell the road and distribute among them its proceeds. Such an extreme procedure, however, should not be authorized by any court, except under circumstances of absolute necessity. 13 Serg. & Rawle, 210; 9 Georgia Rep.; 9 Watts & Serg. 27.

"A stronger ground for an injunction than is taken in this case, could not well be conceived. The defendants, under a judgment at law have levied upon a large part of the rolling stock on the road, which, if sold and removed, will stop its operations, while the same stock is under mortgage to creditors whose lien is prior to that of the defendants. Such a procedure, if carried out, in this and other cases, would defeat the liens of creditors in such cases to many millions of dollars, and put an end to the structure, if not the maintenance, of railways.

"The court will perpetually enjoin the proceedings in the case at law, as prayed by the bill, at the costs of the defendants, Pennock and Hart."

property should not be made, under a reasonable prospect of payment, by a faithful application of the profits of the road.

* SECTION III.

WHAT DEFENCES ALLOWED THE COMPANY, IN REGARD TO BORROWED CAPITAL.

1. *Where the transaction is illegal, no estoppel will preclude its defence.*
2. *Company may contract, beyond present powers, on future contingency of obtaining enlarged powers.*
3. *Company cannot allege their own fraud in defence.*

§ 236. 1. It is obvious that securities for capital borrowed, by railway, and other companies of that description, with large capital, and intended, in some sense, to serve the purposes of safe investment, must be given, strictly within the powers of the company, and for the purposes of its creation. And where it is the purpose of those, making the advance of capital to such company, as well as, of the company, to perpetrate a direct violation of the charter, or any other specific illegality, to the detriment of the shareholders, or the public, it will afford a sufficient defence to the company itself, upon the most familiar general principles, applicable to the subject. And even an estoppel, by deed, or of record, will not enable the creditor, to so conclude the company, who stand in some sense in a fiduciary relation, as *quasi* trustees, for the shareholders, and the public, as to escape the real question, involved in the transaction.[1]

2. Where the company agreed to sell shares to a party, on condition, that as soon as they were paid in full, they would give debentures, in exchange for the shares, if they should then be in a condition legally to do so, the contract was held to be illegal, and a decree of specific performance was refused, on the ground, that the company, were not, at the time, authorized to raise

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[1] Hill *v.* Proprietors of Manch. & Salford Water-Works, 2 Barn. & Ad. 544. But unless some fraud is alleged to have been attempted to be perpetrated upon the shareholders, the estoppel will be enforced. See also Doe d. Chandler *v.* Ford, 3 Ad. & Ellis, 649.

But the mortgagor is estopped from setting up a prior mortgage, to defeat the present action. Doe d. Watton *v.* Penfold, and Doe d. Levy *v.* Horne, 3 Q. B. 757. As to where time is of the essence of contracts, for the conversion of one security into others, see Campbell *v.* The London & Brigh. Railway, 5 Hare, 519.

money in that mode.[2] But where the trustees, under turnpike acts, having * power to borrow money, on mortgage of the tolls and toll-houses of the company, executed such a mortgage to their clerk, to whom they were indebted for costs, and recited in the deed, that it was given for moneys advanced, it was held valid.[3]

3. But the company cannot set up, in defence of a security properly executed by them, that it was through fraud, between other parties and among themselves, not executed and delivered to the party, really entitled to receive it.[4]

SECTION IV.

RIGHT TO ISSUE PREFERRED STOCK. CONVERTING LOAN INTO CAPITAL.

1. *The company may issue new stock, and give it preference, as a* bonâ fide *means of borrowing money.*

2. *By English statutes, loan may be converted into capital. Terms of statute must be strictly pursued. Courts of equity cannot dispense with them.*

§ 237. 1. The company, where the capital is not limited in the charter, may, from time to time, issue new shares, and even give them a preference probably, as a mode of borrowing money, where they have the power to borrow, on bond and mortgage, as preferred stock is only a form of mortgage. But without the power to mortgage expressly given, the right of the majority to issue preferred shares, a majority of which they would themselves be entitled to hold, might be more questionable.

2. By the English statutes, loan may, on certain conditions, be converted into capital; but those interested must strictly pursue the terms prescribed, for accomplishing such change, and time is regarded, as of the essence of the right to claim such conversion.[1] And it is no sufficient reason to claim a dispensation, at the hands of a court of equity, that one of the shareholders was out of the country, and had no notice of the vote of

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[2] West Cornwall Railway *v.* Mowatt, 17 Law J. (Chan.) 366.

[3] Doe d. Jones *v.* Jones, 5 Exch. 16.

[4] Horton *v.* The Westminster Improvement Comm'rs, 14 Eng. L. & Eq. R. 378.

[1] Hodges, 160, 161, 162; Campbell *v.* London & Br. Railway, 5 Hare, 519.

the company, till after the time limited in the same, for application to convert loan into shares, had expired.[2]

*SECTION V.

INVESTING TRUST FUNDS IN RAILWAY SECURITIES.

1. *General duty of trustees, in regard to making investments.*
2. *English courts have regarded railway securities too uncertain for such purpose.*
3. *Statement of a case, upon the subject, in New Hampshire.*

§ 238. 1. A trustee is ordinarily excused where he exercises his best judgment, and the fund is lost, or diminished, by what appears to be a mere casualty. But he is always *primâ facie* liable for any such loss, and ultimately, unless he can show very clearly, that he was not in fault. By this is understood commonly, that he invested and managed the fund, as a prudent man would do with his own. And as the purpose of such funds ordinarily is to raise an annuity, it must be invested in some mode; and the most that human foresight can accomplish is, to make a wise selection of the different opportunities, which offer.[1]

2. But where, by the terms of a settlement, the trustees had authority to invest in the public stocks, or real securities, it was held a breach of trust, to invest the trust fund, in railway debentures, not so much because this might not be fairly regarded, as a real security, as on account of the uncertain character of the security.[2]

3. In a recent case[3] in New Hampshire this subject is dis-

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[2] Parsons *v.* London & Croydon Railway, 14 Simons, 541.

[1] 2 Story, Eq. Jur. § 1269, 1271; Clough *v.* Bond, 3 Mylne & Craig, 490, 496. But it is said, if the trustee mix the fund with his own money, or invest it, in an improper stock, he is liable. 2 Story, Eq. Jur. § 1270, 1271; Massey *v.* Banner, 4 Mad. Ch. R. 413; Thompson *v.* Brown, 4 Johns. Ch. 619; Knight *v.* Lord Plimouth, 3 Atk. 480; Powell *v.* Evans, 5 Vesey, 839.

[2] Mant *v.* Leith, 10 Eng. L. & Eq. R. 123. In the case of Ellis *v.* Eden, 30 Law Times, 601, where one devised to trustees certain securities for the payment of legacies, and directed it to be reduced to cash, excepting, among other things, such as consisted of "stock in the foreign funds," it was held that this term included the American state stocks, of Virginia, Massachusetts, &c. but did not include Boston water scrip, or bonds of the Pennsylvania railway.

[3] Kimball *v.* Riding, 11 Foster, R. 352.

cussed, at length, and the following results arrived at, by a judge of extensive learning and experience, Chief Justice *Woods:* 1. Where money is bequeathed to a trustee, "to be invested and improved according to his best skill and judgment, it is his duty to invest it in safe securities, and his discretion, in the selection of investments, is not enlarged by the words "according to his best skill and judgment." 2. If a trustee's authority enables him to invest in stocks, they should appear to have been, at the time, productive, and to have had a market value, depending upon their income, and not upon contingencies. 3. Shares in a contemplated railway are not such.

*SECTION VI.

BONA FIDE HOLDER OF RAILWAY BONDS, WITH COUPONS, MAY ENFORCE THEM.

1. *Railway bonds payable to bearer, with coupons, negotiable securities.*
2. *This rule extends both to the bonds and coupons for interest.*
3. *Same rule extended to bonds issued by municipal corporations.*

§ 239. 1. In a late case in New Jersey,[1] it was decided by the Court of Appeals, that bonds, with coupons, payable to bearer, issued by the plaintiffs, passed by delivery, from hand to hand, the same as bank-notes, and that a *bonâ fide* purchaser, for value, without notice of any prior defect in the title from the company, might enforce them, independent of all equities between the company and the first holder. This decision is approved in the late case of Mechanics Bank *v.* New York & New Haven Railway.[2] The same principle has been extended to certificates of deposit,[3] and to state bonds.[4] The English courts have adopted the same rule, in regard to bonds of the King of

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[1] Morris Canal & Banking Company *v.* Fisher, 1 Stockton, Ch. R. 667. Professor Parsons, in his work on Contracts, vol. 1, 240, says: "It may however be here said, that we regard the English authorities, as making all instruments negotiable, which are payable to bearer, and which are also customably transferable by delivery, within which definition we suppose the common bonds of railroad companies would fall."

[2] 3 Kernan, 599.

[3] Stoney *v.* American Life Ins. Co. 11 Paige, 634.

[4] Delafield *v.* State of Illinois, 2 Hill, 159.

Prussia;[5] to Exchequer bills,[6] and bonds of the government of Naples, when put in a condition to be negotiable in that country.[7]

2. We think there can be no reasonable doubt of the soundness of the principle, as applied to railway bonds, made payable to bearer, with coupons attached, for the payment of interest. And we are confident this is the view taken of this question generally, by commercial men, and companies, both as to the bonds, and the coupons.[8]

*3. And in a very late case in the state of Mississippi, the question has been considered by their court of errors, in regard to the bonds issued by the city of Vicksburg,[9] and the conclu-

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5 Gorgier *v.* Mieville, 3 B. & Cress. 45.

6 Wookey *v.* Pole, 4 Barn. & Ald. 1.

7 Lane *v.* Smyth, 7 Bing. 284.

8 Carr *v.* LeFevre, 27 Penn. R. 413, where the court held such bonds may be sued in the name of the holder, and that possession is *primâ facie* evidence of ownership. And where a suit is brought, for the collection of the interest due on such bonds, evidenced by coupons, the court will not allow the payee of the bond, to take judgment for the interest due, until the coupons are produced. Williamson, Trustee, *v.* The New Albany & Salem Railw. in the Circuit Court of the U. S. before Mr. Justice *McLean*, *ante*, § 235.

9 Craig *v.* The City of Vicksburg, 9 Am. Railway Times, No. 11, March 12, 1857. But it is said that a decision was made in Alabama, many years since, by a divided court, against the rule here adopted, but that it has been overruled.

But see *ante*, § 35, n. 2. But see Athenæum Assurance Co. *v.* Pooley, 31 Law Times, 70; *ante*, § 234, n. 10.

The case of Zabriskie *v.* The Cleveland, Columbus & Cincinnati Railw. before the Circuit Court of the United States for the Northern District of Ohio, 10 Am. Railw. Times, No. 15, is justly regarded as an important one. The opinion of Mr. Justice *McLean*, discusses many points, incidentally connected with the subject. But the decision seems to be placed mainly upon the ground, that the bonds having gone into the market, in the form of negotiable securities, payable to bearer, and the company having at a meeting (although defectively called) ratified the issue, and this being known, for more than two years, to the agent of the complainant, residing abroad, before any movement was made, by any party, to enjoin them, the acquiescence was such, as to conclude the plaintiff, who sued for an injunction, as a stockholder, on the ground that the indorsement and payment of these bonds, by the defendants, would tend to diminish their profits. This ground seems to us entirely satisfactory. It is questionable, whether the guaranty of the bonds, by defendant, is not, under the statutes in force in Ohio, allowing railway companies, to aid in the construction of other connecting railways, "by subscription to their capital stock or otherwise," *primâ facie* to be regarded, as a legitimate commercial contract; and if so it is not such an act, as

sion arrived at, that such bonds, payable to bearer, pass from hand to hand, by delivery, like bank-notes, and that the holder's title depends upon the fact of his being the bearer *bonâ fide*, and that, as such, he may recover of the maker, without giving further proof of title. And that the maker can only defend an action, so brought, by the bearer, by proving that the holder had knowledge of the defence, at the time, or before, he received the bond.

*CHAPTER XXXIII.

DIVIDENDS.

SECTION I.

WHEN DIVIDENDS ARE DECLARED, AND HOW PAYABLE.

1. *Dividends should be declared only from net earnings of company.*
2. *Right of shareholders to dividends declared is several, but joint before declared.*
3. *Lien upon shares creates a lien upon dividends.*
4. *Surety on bank-note or bill may restrain transfer of principal's stock.*
5. *Action will not lie against company for dividends till demand.*

§ 240. 1. DIVIDENDS are only to be declared out of the actual earnings of the company; and if they be declared, when not

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is calculated to put the purchaser on his guard, and thereby affect him with constructive notice of any latent infirmity in the prior proceedings of the company, in making the guaranty. This is the pervading view maintained in the opinion.

But it is here conceded, that if the charter of the company, or the general laws, prohibit such a contract being entered into, by such a corporation, the contract although made in the form of a negotiable security, is void, in the hands of a *bonâ fide* holder for value. Root *v.* Goddard, 3 McLean, 102; Root *v.* Wallace, 4 id. 8. And it seems to be conceded, as a general rule, that in regard to the requisite formalities, either of the charter, or the general laws of the state, one who takes negotiable securities in the market, in the due course of business, is not obliged to make inquiries, beyond the point of the capacity of the parties to contract, in the particular form presented upon the face of the paper.

And where the records of the company show the requisite formalities to have been complied with, this, as between the company and third parties, will be held conclusive against them. *Ante*, § 23.

earned, and so virtually payable out of the capital, or which is the same thing, out of money borrowed, and this be done for the purpose of increasing the price of shares, or the credit of the company, (and it is difficult to conjecture any other motive, unless done under a misapprehension of the true state of the company's finances,) it is a fraud upon the shareholders, and upon the public, also, and any one injured thereby, as we have before seen, is entitled to relief, either in equity or at law.[1]

2. After a dividend is declared, each party entitled, has a right in severalty to his particular proportion.[2] And, therefore, one party cannot bring a bill on behalf of himself and other shareholders, to *enjoin the payment of a dividend already declared, until the entire line is opened, even where this is one of the express requirements of the charter of the company.[3] For in such a proceeding, the interests of those entitled to the dividend, after it is declared, become, not only several and distinct, but positively adverse to each other, so that one cannot be said, in any proper sense, to represent the others, as to a dividend already declared.[3] But as to future dividends, one shareholder may bring a bill, on behalf of himself and others, standing in the same relation, to enjoin the company from declaring future dividends, until they have completed their whole line, according to the requirements of their charter.[3] And as to dividends already declared, a bill brought in such a form as to make all parties interested, parties to the bill, might enable a court of equity to restrain its payment.

3. A lien upon shares gives, as an incident, a lien upon the dividends, and a right to receive, and retain them.[4]

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[1] *Ante*, § 41, 211. But a court of equity will not restrain the company from paying a dividend, upon the ground merely, that the directors have acted in violation of their duty to the public. Brown *v.* Monmouthshire Railway & Canal, 4 Eng. L. & Eq. R. 113; Stevens *v.* South Devon Railway, 12 Eng. L. & Eq. R. 229; *ante*, § 211.

[2] Coles *v.* Bank of England, 10 Ad. & Ell. 437; Davis *v.* Bank of England, 2 Bing. 393; s. c. 5 B. & C. 185; Feistel *v.* King's College, Cambridge, 10 Beav. 491; City of Ohio *v.* Cleve. & Toledo Railway, 6 Ohio St. R. 489; Carpenter *v.* N. Y. & N. H. Railw. 5 Abbott, Pr. R. 277.

[3] Carlisle *v.* Southeastern Railway, 6 Railw. C. 670. So also where the company have no surplus earnings, they may be restrained from paying a dividend already declared. Carpenter *v.* N. Y. & N. H. Railw. 5 Ab. Pr. R. 277.

[4] Hague *v.* Dandeson, 2 Exch. R. 741.

4. And it has been held, that a surety of a shareholder may require the company, to apply dividends due the principal, upon the debt, or prohibit the transfer of the stock, where they hold a lien upon it, under penalty of his discharge; but without this requirement, the corporation might allow the transfer to be made, without losing any right against the surety.[5]

5. It seems to be settled, as a general rule, that an action will not lie against the company, for dividends declared, until demanded, nor will interest accrue, or the statute of limitations begin to run.[6]

SECTION II.

PARTY ENTITLED TO DIVIDENDS WHERE STOCK HAS BEEN FRAUDULENTLY TRANSFERRED.

1. *Fraudulent transferree not entitled to dividends, but subsequent* bonâ fide *purchaser may be.*
2. *But the* bonâ fide *owner may so conduct as to forfeit his claim.*
3. *One who buys stock in faith of the title on company's books may hold, as against company.*

n. 1. *Review of English decisions.*

§ 241. 1. The party, who has obtained a fraudulent transfer of * stock, into his own name, upon the books of the company, is never entitled to the dividends, and if the fraud is ascertained, before the dividends are paid, the payment, to such party, may lawfully be resisted. But it often happens, that the dividends are paid to such party, before the fraud is discovered, or the shares may have been transferred to some innocent purchaser, in faith of the title of such fraudulent party appearing upon the books of the company. In such case, where there was no fault upon the part of the original owner, or where the transfer is made by a forged power of attorney, both the original owner, and the innocent purchaser, will be entitled, as against the company, to demand the dividends, or their equivalent. The first, because he is still the owner of the shares, not being, in any just sense, bound by the transfer, which the company have allowed upon their books without his concurrence; and the latter, because he

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[5] Perrin *v.* Fireman's Ins. Co. 22 Ala. 575.

[6] State *v.* Baltimore & Ohio Railway, 6 Gill, 363; Ohio City *v.* Cleveland & Toledo Railway, 6 Ohio St. R. 489; Phila. Wilmington & Balt. Railw. *v.* Cowell, 28 Penn. St. R. 329.

has been induced to pay his money for stock, which the company allowed to stand, upon their books, in the name of the vendor. These joint-stock companies are bound to look into the title of any one, who claims to have stock transferred into his name on the books of the company.[1]

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[1] Davis *v.* The Bank of England, 2 Bing. 393. *Best*, Ch. J., says: "It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorized to do so. They may take reasonable time to make inquiries and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder who is to suffer, if *for want of inquiring*, and it does not appear that any inquiry was made in this case, they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority.

"We cannot do justice to this plaintiff unless we hold that the stocks are still his. If we say that they have been transferred, and that he must take a verdict for compensation for the loss of them, (as these transactions occurred four years ago,) the highest sum that we can give upon this verdict will fall very short of what it will cost the plaintiff to replace his capital, and he must besides lose all the dividends that have become due since the trial, which took place nearly two years ago. In every case that can occur, the stockholder (if he is to proceed for compensation) must run the risk of having his capital and income diminished, by a rise in the funds between the verdict and judgment, and if that judgment be delayed, as will frequently happen by the occurrence of any legal difficulty, he will lose the dividends that would have become due to him during that time. This case shows that time may be several years. It may be said he may prevent this by replacing the stock, but it may frequently happen that he is not in a condition to do this. Another consequence of the stocks being considered as transferred, will be most alarming to those who live at a distance from London, and receive their dividends by attorney; namely, that their claim to compensation in case their stocks could be transferred without their authority may be barred by the statute of limitations. What has lately occurred has shown us that the forging of powers of attorney to transfer stock may be concealed for more than six years, and the cases of Battley *v.* Faulkner, 3 B. & A. 288; Short *v.* M'Carthy, id. 626, and Brown *v.* Howard, 4 Moore, 508, prove that the statute of limitations begins to run from the time of the act being done that gives occasion to the action, although it was not known to the party who suffers from it. I can find no case in which the question, whether the stock is transferred by the act of the bank has been raised. There is one in Bernardiston's Reports, p. 324, where a man of the name of Edward Harrison, got South Sea stock which belonged to another Edward Harrison, put to his account in the books of the company, and then transferred this stock to his broker to sell, and which stock the broker sold. A bill was filed by the executor of Edward Harrison, the owner of the stock, against the executor of Edward Harrison who so fraudulently procured it to be put into his name, and the Chancellor said, that the plaintiff should have a quan-

*2. In the case just cited the former owner of the stock learned of the fraudulent transfer, some months before he informed the

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tity of stock equal to that transferred bought for him, or else have a satisfaction for the stock equal to what it was worth at the time it was sold out: and his lordship added, there is another and more difficult question; and that is, how far the company may be liable to make satisfaction in case there are not sufficient assets left by the Harrison who improperly possessed himself of this stock.

"In this case it seems to be assumed that the stock had passed out of the name of the owner by this transfer, under a fraudulent assumption of his name, although he never assented to such transfer; but whether it had so passed or not was not considered, and I, therefore, cannot think this case any authority against our opinion if it were correctly reported. I think, however, that this case is not correctly reported by Bernardiston: the same case is to be found in 2 Atkins, p. 120, in the name of Harrison *v.* Harrison. In this report it appears that the stock was transferred by a trustee, and if so, the question whether a transfer unauthorized by the stockholder would alter the property in the stock could not arise; the trustee having a legal authority to transfer, although he might be guilty of a breach of trust by exercising that authority. This circumstance also accounts for the doubtful manner in which Lord *Hardwicke* speaks of the liability of the company to replace the stock. The question there was, whether the South Sea Company were bound to prevent a breach of trust, and not whether a stockholder's name can be taken from the books without his own authority, and the company that has permitted this act not be responsible for the consequence of it. We are not called on to decide whether those who purchase the stock transferred to them under the forged powers, might require the bank to confirm that purchase to them, and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent, as far as we can, the alarm which an argument urged on behalf of the bank is likely to excite, we will say, that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfer to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock, as you can that of an estate. You can-

company, and in the mean time the offender left the country, and this was held no bar to his claim to the dividends. But it was considered, that in this case, if the bank had paid the dividends to the fraudulent party, during the interval that the plaintiff withheld this information, he could not have recovered for such dividends. But a misprision of felony shall not have the effect to forfeit stock, to which the plaintiff has an indisputable title. In some of the American courts a similar doctrine is recognized.[2]

3. And if the company suffer the stock to stand upon their books, in the name of a naked trustee, without interest, and issue scrip in the name of such trustee, and a *bonâ fide* purchaser of the stock of such trustee, advances money for it, he will be permitted to hold it, against any lien the company may have upon it, as against the real owner of the stock.[3]

SECTION III.

GUARANTY OF DIVIDENDS UPON RAILWAY STOCK.

1. *Guaranty of dividends upon stock for period of years.*
2. *Rule of damages, in such case.*

§ 241 *a.* 1. Contracts for the guaranty of dividends upon railway stock, as a part of the contract of sale of shares in such stock, are not uncommon. Questions have arisen, in regard to the proper construction of such contracts; whether they have reference to the quality of the stock, or merely to the product, for the particular period.

In a late case in Pennsylvania,[1] a contract of guaranty, upon

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not look further, nor is it the practice even to attempt to look further than the bank-books for the title of the person, who proposes to transfer to you."

[2] Pollock *v.* The National Bank, 3 Selden, R. 274; Sabin *v.* The Bank of Woodstock, 21 Verm. R. 353; Lowry *v.* The Com. & Farmers' Bank of Baltimore, Cir. Ct. before *Taney*, Ch. J. 1848; Cohen *v.* Gwinn, 4 Md. Ch. Decis. 357. *Ante*, § 32.

[3] Stebbins *v.* Phœnix Fire Ins. Co. 3 Paige, 350.

[1] Struthers *v.* Clark, 10 Am. Railw. Times, No. 21. Supreme Court of Penn. The exposition of the subject, in the opinion of the court, is clear and satisfactory. Mr. Justice *Woodward* said: —

"Now, dividends mean proportionate shares of the profits earned by the capital stock of a concern. When we speak of dividend-paying stock we characterize the whole capital stock, and express its quality. There is no such thing as

the sale of two hundred shares of railway stock, was in these words, that "said stock should yield annually six per cent. dividends, for the space of three years from and after" a certain date, and it was held, that the guaranty had reference to the quality of the stock, and not exclusively to the product for the specified term.

2. The rule of damages, for the breach of such a contract, was held to be, the difference in value, between the stock sold, and one, which would have produced the specified dividends for the term named in the contract.[2]

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dividends of fractional parts of an entire stock. Certain stockholders of a common stock cannot be entitled to dividends in exclusion of others. Dividends occur to all or none.

"When these parties therefore stipulated that the capital stock of the Rutland and Washington Railway Company, or two hundred particular shares thereof should 'yield' (a word which implies a natural accretion from the business of the company,) a dividend annually of six per cent., they used the common language of the day to express the value or quality of that stock, and if it proved incapable of yielding that measure of profits there was a breach of the guaranty.

"The position and circumstances of the parties, as well as the consideration paid, tended to confirm the conclusion to which their words conduct us.

"Struthers lived in Warren county, Pennsylvania. The contract was made in New York. Clark is said, though I see no evidence of it on the paper-book, to have been the president of this Vermont railway company, but it is certain he was a large stockholder and well acquainted with it. It was a new road and had not yet acquired any general reputation with which Struthers could be supposed to be acquainted. He was selling Pennsylvania lands to Clark. Now it was not unreasonable that he should require a guaranty of the stock of which he had so little knowledge, nor is it strange that, seeing a responsible man willing to guaranty it as a six per cent. stock for three years, he should have considered it would be capable of taking care of itself after that period. A railway stock that would yield at that rate in the first three years of its life would be likely to grow better as it grew older."

[2] The court, upon this point, said: "Such, then, we infer from the circumstances of the parties as well as from their words, was the tenor of their agreement—a guaranty that the stock was of a quality to yield the specified dividend for three years. But it was not a stock of such quality; on the contrary, it is said to be worthless, or nearly so. Is then the measure of damages a matter of doubt? The rule in such cases is the difference between the value of the stock transferred and such a stock as this was guarantied to be. Dyer *v.* Rich, 1 Metcalf, 192. How much more would such a stock have been worth to him than that which he got?

"The defendant imagines that he may escape by paying six per cent. per annum for three years on the shares transferred, but such was not his engage-

CHAPTER XXXIV.

RIGHTS OF CREDITORS AND CORPORATORS.

SECTION I.

DISSOLUTION OF RAILWAYS.

1. *Different modes in which railway companies may be dissolved:* —
(1.) *By act of the legislature.*
(2.) *By surrender of franchises and acceptance by legislature.*
(3.) *By forfeiture; from abuse or disuse of franchises.*
2. *Shareholders not generally liable to creditors.*
3. *Shareholders entitled to proportionate share of net profits.*
4. *Liability of subscribers, when scheme is abandoned.*
5. *Commonly liable for share of expenses.*
6. *Party receiving shares bound by terms of association.*
7. *Not being informed, that deposits not paid, no fraud.*
8. *Shareholders cannot exonerate themselves by contract with directors.*
9. *Corporations cannot give away effects, to prejudice of creditors.*
10. *If charter is repealed, by virtue of power reserved, courts presume it was rightfully done.*

§ 242. 1. A RAILWAY corporation may be dissolved in the same manner, as other private moneyed corporations.

(1.) By act of parliament, which alone, by the English constitution, has inherent power to dissolve, or repeal the charter of corporations, although the king may create them.[1] But the failure to hold meetings and elect officers is not, within reasonable limits, to be regarded as a dissolution of the corporation.[2]

(2.) By surrender to the legislature of all its corporate fran-

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ment. It was likened in the argument, not inaptly, to a sale of a cow with warranty that she would produce so much milk for a given time. Nobody would doubt that such a contract would be a warranty of essential and intrinsic qualities in the cow, rather than a promise to pay the buyer the price of so much milk. So we think here. The plaintiff had a right to demand a stock that would yield, in the manner of stocks, the stipulated dividends, and failing to get it, he is entitled to damages according to the standard indicated."

[1] *Ante*, § 204.

[2] Angell & Ames on Corp. § 771, and cases cited; Smith *v.* Steamboat Co. 1 How. (Miss.) R. 479.

chises, and the acceptance of such surrender.[3] But the mere non-user, or abuse of its corporate franchises, will not amount to a surrender. This must, in general, be effected, by some distinct and unequivocal act of the corporation, accepted by the government.[4]

(3.) By forfeiture of the corporate franchises, by disuse, or abuse, judicially declared, upon *scire facias* or *quo warranto* brought for that purpose.[5] This is the only mode in which a forfeiture of corporate franchises can be determined, and such question cannot be collaterally raised in suits instituted by the corporation, as the state may waive any forfeiture committed by the corporation.[6]

2. The rights of creditors against the corporation will depend upon the charter, and the general statutes, in force at the time of its creation, and dissolution. But there is no liability of the

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[3] Angell & Ames, § 772; 2 Kent's Comm. 310, and notes; Missouri and Ohio Railway *v.* State, 29 Ala. R. 573.

[4] Town *v.* Bank of River Raisin, 2 Doug. (Mich.) R. 530; 2 Kent's Comm. 312, and notes. A railway corporation is not dissolved, by the sale of a part, or all of its road, upon execution. State *v.* Rives, 5 Iredell, 297, 309. See Commonwealth *v.* Tenth Mass. Turnpike Co. 5 Cush. R. 509; State *v.* Bank of Maryland, 6 Gill & J. 205; De Ruyter *v.* St. Peter's Ch. 3 Comst. 238.

[5] Ang. & Ames, § 774. The Eastern Archipelago Co. *v.* Regina, 22 Eng. L. & Eq. R. 328, in Exchq. Ch. s. c. in Q. B. 18 Eng. L. & Eq. R. 167; *Ante*, § 204. A corporation cannot, except with the consent of the legislature, alienate its property, (as where all the stock in one railway is subscribed by another railway which has the entire control of the first corporation,) and thus relinquish the control and management of its affairs, so as to divest itself of further responsibility. York & Maryland Line Railway *v.* Winans, 17 Howard, U. S. R. 30.

[6] State *v.* Fourth N. H. Turnpike Co. 15 N. H. R. 162; Young *v.* Harrison, 6 Ga. R. 130; Bank *v.* Trimble, 6 B. Mon. 599; Johnson *v.* Bentley, 16 Ohio, 97; 16 S. & R. 140; Union Branch Railway *v.* E. Tenn. & Ga. R. 14 Ga. R. 327; Illinois Central Railway *v.* Rucker, 14 Ill. R. 353; 5 Johns. Ch. R. 366; 19 Johns. R. 456. But a charter may be made dependent upon the performance of conditions precedent, in such a form, as that non-performance will work a forfeiture. Parmelee *v.* Oswego & S. Railway, 7 Barb. 599. See also R. M. Ch. 250; Wilmans *v.* Bank of Illinois, 1 Gilm. 667; Enfield Toll B. Co. *v.* Conn. River Railway Co. 7 Conn. 28; 23 Wendell, 222; 11 Ala. 472; Brookville & G. Turnp. Co. *v.* McCarty, 8 Ind. R. 392. *Ante*, § 18.

After the forfeiture judicially determined, the company can do no act, unless its power and capacity for that purpose are continued, by statute. Saltmarsh *v.* Planters and Merchants' Bank of Mobile, 17 Alabama, 761. See also Attorney-General *v.* Petersburg & Roanoke Railway, 6 Iredell, 456, where the state is held bound by an implied waiver of forfeiture of corporate charters.

shareholders, beyond the amount of their subscriptions, in the absence of special liability imposed, either by the charter, or the general laws of the state, in force, at the time of the incorporation.[7]

3. The rights of shareholders will be to a proportion of the assets of the company, where it had already gone into operation, and the managers and directors were guilty of no fraud, either in * the management, or closing up of the concerns of the company. But where a scheme is set on foot, and a prospectus issued, stating, that all money deposited will be laid out at interest, and after some subscriptions had been paid to the directors, who had the management of the concern, but before any money was laid out, the directors resolved to abandon the concern, it was held, that each subscriber might recover the whole sum paid in, by him, of the directors, in an action for money had and received, without the deduction of any part towards the expense of the concern.[8]

4. And where the company goes into operation, without the subscription of the full number of shares limited in the charter, it is an irregularity, and may become a fraud, in those who consent, but it will not render those shareholders liable, upon the contracts of the directors, who do not assent to the company thus going into operation.[9] So, too, where the party is induced

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[7] *Post*, § 244.

[8] Nockels *v.* Crosby, 3 B. & Cresswell, 814; Walstab *v.* Spottiswoode, 4 Railw. C. 321. In this case the prospectus promised to issue scrip, on demand, for the full sum deposited, but that was refused, and the party was held entitled to recover the full sum deposited. Ashpitel *v.* Sercombe, 5 Exch. 147; Chaplin *v.* Clarke, 4 Exch. 403.

[9] Pitchford *v.* Davis, 5 M. & W. 2; Fox *v.* Clifton, 6 Bing. 776; Bourne *v.* Freeth, 9 B. & Cress. 632.

In a recent case in Georgia, Sisson *v.* Matthews, 20 Ga. R. 848, s. c. 17 Ga. 544, it was attempted to charge the members of a manufacturing corporation, in equity, upon the ground, that the defendants were originally carrying on the same business, as a copartnership, and obtained the act of incorporation, and transferred the business and responsibility to the corporation, with a view unjustly and fraudulently to exonerate themselves, save their former losses, and thereby impose a corresponding loss upon the creditors of the corporation, who gave credit to it, subsequent to its incorporation, upon the ground that in the petition to the legislature, for the act of incorporation, the defendants represented the foundry of the copartnership as being in actual operation, at the time of the petition being preferred, when in fact it required $2,000 to be raised upon the

to pay his money, and execute the subscribers' deed, under a false representation, by the defendants, the managing directors, and the scheme is finally abandoned, the plaintiff is entitled to recover his whole money, as upon a failure of consideration.[10]

5. But where the amount of the capital to be raised is stated, in the prospectus, as *not exceeding* £700,000, and the sum actually subscribed is less, the subscribers are not excused from paying their proportion of the expenses, on that account.[11] But the managing committee, who subscribe for shares, and pay deposits, in order to comply with the standing orders of the House of Commons, will not be allowed to treat this as a loan to the company, as this would be an express fraud upon parliament, but they are liable the same as other subscribers.[12] But where no fraud is shown to induce the plaintiff to sign the parliamentary contract, and subscribers' agreement, he cannot recover his deposit, as money had and received, or any portion of it, although the scheme had proved abortive, the contract subscribed giving the managers power to * expend the money, in carrying forward the undertaking, in the mode they did, and they having expended it in that manner.[13]

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credit of the corporation to put it in operation, which they subsequently had to refund; and also that the corporation, after the act, paid $4,000 of the debts of the former company, thus reducing their available means $6,000 below what was represented in the petition to the legislature, upon which the plaintiffs relied, as truth, and were thereby induced to give credit to the corporation, and which they now sought to enforce, to the extent of the $6,000, against the defendants.

The court held that there was no such sequence between the representation to the legislature, and the credit given to the corporation, as to form the basis of obtaining a false credit; the act of incorporation not having annexed any conditions to the charter, it was not competent to qualify the liability of the corporators, by going behind the act of incorporation.

The court seem to concede, in the opinion, that if the defendants had induced the credit, by a substantial misrepresentation, in regard to the funds or liabilities of the corporation, made directly to the plaintiffs, for that purpose, and with that intent, they might be made liable, in this form, to indemnify the plaintiffs against the loss, which they sustained by such false representation.

10 Wontner *v.* Shairp, 4 C. B. 404; Jarrett *v.* Kennedy, 6 C. B. 319.

11 Watts *v.* Salter, 10 C. B. 477. See *post*, § 2 and notes. Appendix, A.

12 Clements *v.* Bowes, 21 Eng. L. & Eq. R. 471; s. c. 8 Eng. L. & Eq. R. 238; Upfill's case, 1 Eng. L. & Eq. R. 13.

13 Garwood *v.* Ede, 1 Exch. 264; Atkinson *v.* Pocock, id. 796; Jones *v.* Harrison, 2 id. 52; Willey *v.* Parratt, 3 id. 211.

6. And the party having made his application for shares, in such an undertaking, and paid his deposit, and received scrip certificates, in the usual form, stating, that the parliamentary contract and subscribers' agreement had been subscribed by the person, to whom the certificate was issued, is bound by such contract and agreement, the same, as if he had subscribed them.[14]

7. And it was held, that the fact, that the plaintiff is not informed that deposits had not been paid, upon all shares allotted, at the time the plaintiff subscribed for shares, is no such fraud, as will exonerate him from his obligation.[15]

8. By the deed of settlement of a joint-stock company no shares could be transferred, without the consent of the directors; the company being unprosperous and getting into serious disputes, the shareholders agreed to pay a sum to the directors, in full discharge of their liabilities, which was accepted and transfers made accordingly, and the shareholders retired. The company being ordered to be wound up, it was held that the retiring shareholders were still liable, as contributories.[16]

9. An insolvent corporation cannot give away its effects, to the prejudice of its creditors; and any arrangement between the company, and the shareholders, to enable them to escape from their just liabilities to the company, to the prejudice of their creditors, will be void, both in equity, and at law.[17] But this will not preclude the company from allowing legal or equitable set-offs, upon debts due them.[17]

10. Where the legislature, either in granting a charter to a company, or by the general laws of the state, have a right reserved, to repeal the charter, and the right is accordingly exercised, courts will *primâ facie* presume in favor of the regularity of the act.[18]

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[14] Clements *v.* Todd, 1 Exch. 268; Carrick's case, 5 Eng. L. & Eq. R. 114. But he is not a contributory for expenses, unless he authorizes them. Id.

[15] Vane *v.* Cobbold, 1 Exch. 798.

[16] Bennett, *ex parte*, 27 Eng. L. & Eq. R. 572.

[17] Goodwin *v.* McGehee, 15 Alabama R. 232.

[18] State *v.* Curran, 7 Eng. (Ark.) R. 321. But to make the surrender of a corporate charter effectual, it is necessary, that it be accepted, by the government, and that this appear of record. Norris *v.* Smithville, 1 Swan, (Tenn.) R. 164.

The repeal of a charter vests the public work in the state, to be managed by

*SECTION II.

LEVY UPON PROPERTY OF COMPANY.

1. *Where charter creates lien, it is paramount to all others.*
2. *Road, or tolls, not subject to levy of execution.*

§ 243. 1. Where the statute of the state provided, that the state shall subscribe for half the stock, in all incorporated railway and turnpike companies, and have a lien upon the property of the company, to the extent of the money advanced by the state, as a corporator, to secure the payment of the other half of the stock, by individual subscribers, it was held, that the property of such corporation was not liable on *fi. fa.* for its debts, till the lien of the state was extinguished, by the payment of the stock.[1]

2. It has been held that creditors cannot levy their executions, upon a turnpike-road,[2] and the same rule will necessarily apply to railways. And it has been determined that a judgment lien, which attaches only to estates in land, does not bind tolls collected after the rendition of the judgment.[3]

SECTION III.

EXECUTION AGAINST SHAREHOLDERS.

1. *Mode of obtaining execution under English statute.*
2. *Remedy, in this country, by distinct action, more commonly.*
3. *May proceed in equity.*
4. *Payments in land valid.*
5. *How stockholders may transfer personal liability.*

§ 244. 1. By the thirty-sixth section of the English Compa-

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them, or regranted, at their election. Erie & Northeast Railway *v.* Casey, 26 Penn. R. 287.

1 State *v.* Lagrange & Memphis Railway, 4 Humph. 488.

2 Ammant *v.* The New Alexandria and Pittsburgh Turnpike, 13 Serg. & R. 210. Other real estate of the company may be levied upon, but if it be joined in one levy with the road, the whole levy is void. But in a subsequent case it was held, that the toll-house of a turnpike company was so far an integral part of the franchise and a necessary incident, that it was not liable to the levy of an execution, by the creditors of the company. Susquehanna Canal Co. *v.* Bonham, 9 Watts & Serg. 27.

3 Leedom *v.* Plymouth Railway, 5 Watts & Serg. 265; s. c. 2 American Railw. C. 232.

pies' * Clauses Consolidation Act of 1845, it is provided, that if execution shall have issued against the company and proved unproductive, it may issue against any shareholder to the extent of his shares remaining unpaid. This execution not to issue except upon the order of the court. It is a general rule, that where a party, out of the record, is made subject to execution, the proper mode of procedure is, by *scire facias*.[1] It seems that something more must be shown, than the mere return of *nulla bona*, as to the company. *Bonâ fide*, and substantial, efforts must be first used, to obtain payment of the company.[2]

The *scire facias* must state, that the party is a shareholder, and the amount unpaid, and that execution has issued against the company, and been found unavailing, all which is traversable.[3] It is sometimes said to be discretionary with the court, whether to issue execution against a shareholder, even where it is shown, that a former one against the company has proved unavailing. But this can only import, that the court have a discretion to determine, when the party, claiming the execution, brings himself within the spirit of the statute.[4]

In the case of the Kilkenny & Great Southern and Western Railway Co. in Ireland, which had an office in London, the court of exchequer granted *scire facias* against a director, upon proof of his declaration, at a meeting of the body, that they had no funds to meet their obligations, in consequence of the shareholders not paying calls, although perfectly able to do so.[5] If in this way a shareholder should be compelled to pay more than is due from him he is to be reimbursed by the company.[5]

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[1] Cross *v.* Law, 6 M. & W. 217; Ransford *v.* Bosanquet, 12 A. & Ellis, 813. This is a decision, in the Exchequer Chamber, where the award of execution in the King's Bench is reversed, on the ground that it should be by *scire facias*, but not upon suggestion, or motion, merely. A similar decision is made, ten years later, in 1850, in Hitchins *v.* The Kilkenny & G. S. & W. Railway, 10 Com. B. 160; 1 Eng. L. & Eq. R. 357.

[2] Eardley *v.* Law, 12 Ad. & E. 802; Hitchins *v.* Kilkenny and G. S. & W. Railway Co. *supra;* s. c. 29 Eng. L. & Eq. R. 341.

[3] Devereux *v.* The Same, 1 Eng. L. & Eq. R. 481. In this case, while the court hold, that *scire facias* is the appropriate remedy, to obtain execution against a shareholder, *Pollock*, C. B., protests, that in his opinion, a less formal mode, as by suggestion or motion, is equally competent.

[4] 1 Bennett's Shelford, 224; Hodges on Railways, 92.

[5] Devereux *v.* Kilkenny, &c. Railway, *supra;* Walford, 236.

And by the English statutes, if the inspection of the register of * shareholders is withheld from any creditor, he may file an affidavit stating that fact and the best knowledge he can obtain of who are the shareholders, and this unanswered will be sufficient to entitle him to execution against the persons named, as shareholders, in the affidavit.[6] Or he may proceed by mandamus to compel the production of the register.[7] And it will not deprive the party of his remedy against the shareholders, that he first issued an *elegit* against the lands of the company, which proved unproductive,[7] or that there are funds belonging to the company in the hands of the official manager of the company under the winding-up acts.[8]

2. In this country, by statute often, the shareholders are made liable for the debts of the corporation, in default of payment by them, after judgment recovered. Under these statutes, a distinct action is to be brought against the company. But the shareholders are generally regarded, as so far privy to the judgment against the company, as to be concluded by it.[9] And in such action the organization of the company is sufficiently shown, by proof of the charter, and the transaction of the proper business, under it, for which it was created.[9]

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6 Rastrick *v.* Derbyshire, Staf. & Worcestershire Railw. 24 Eng. L. & Eq. R. 405.

7 Reg. *v.* Derbyshire, Staffordshire, & Worcest. J. Railway, 26 Eng. L. & Eq. R. 101.

8 McKenyon *v.* Shannon Railway Co. Weekly Reports, 1854–5, p. 10.

9 Came *v.* Brigham, 39 Maine R. 35. But it has been held under such statutes, that the shareholders are, in general, liable only for the debts of the corporation, contracted while they were such. Chesley *v.* Pierce, 32 N. H. R. 388; Moss *v.* Oakley, 2 Hill, 265; Moss *v.* McCullough, 5 Hill, 131. But see Curtis *v.* Harlow, 12 Met. 3; Southmayd *v.* Russ, 3 Conn. 52; 5 Conn. 28; 10 Conn. 409, where it seems to be considered that the suit may be maintained against all who are shareholders, at the time the suit is brought. In Conant *v.* Van Schaick, 24 Barb. 87, and three other cases, decided upon the same argument, it was held, that where the statute made the corporators liable for the debts of the company of a certain description, but required the creditor first to pursue his claim to judgment against the company, it entered into the essence of every credit given to the company, and was a part of the contract by which the debt was incurred, that the corporators should be held liable, as general partners.

And where the statute in such case provided, that the amount of the recovery against the corporator should be the amount of the execution, issued upon the judgment recovered against the company, it was held incumbent upon the cred-

3. Where the statute makes the stockholders liable jointly and severally to the amount of their stock, for the debts of the company, and provides, that where any creditor's debt has been refused payment, on proper presentment, he might sue any one or more of the stockholders, it was held that a creditor might under the New York Revised Statutes, file his bill in equity against the company and such stockholders, as were known to him, to charge them with the payment of the debt, and might pray a discovery of the names and residences and amount of stock of the other shareholders, with a view to charge them also.[10]

4. In Pennsylvania, under a statute, making the shareholders *liable to the creditors, to the amount of their unpaid subscriptions, it was held, that payment in lands, conveyed to the company, which were necessary, and authorized for the enjoyment of its franchises, would discharge the liability. That they would not be affected, by after discovered error, in the judgment of the company, as to the value of the lands.[11] And the consent of such stockholder, by being present, and acting, as director, at a meeting when the directors nullified such payments in land, but gave the subscribers a right to surrender their certificates issued thereon, and take new certificates for the amount of money paid by them, does not render him liable, if he offer to surrender his certificate, and take one for his money payments only.[11]

5. Where the general statutes of the state, or the special act of the company, render the stockholders personally liable, for the debts of the corporation, they remain holden, notwithstanding the transfer of their stock, after the debt accrued, until all the

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itor to show, independent of the judgment, that his claim was of the class for which the statute gave a remedy against the company, and that the amount due on the execution was the rule of damages. Id.

The statute in this case provided, that the "stockholders shall be jointly and severally liable for all debts due or owing to any of its laborers and servants, for services performed for such corporation." It was held, that an action lay in favor of all persons employed in the service of the company, whether as enginecrs, master mechanics, or conductors—who do not come under the distinctive appellation of *officers* or *agents* of the company; and a servant who employed and paid men, to work with him, might recover the same, as if he had performed the service himself. Id. The court profess to decide the case upon the authority of Corning *v.* McCullough, 1 Comst. 47. See also 7 Barb. 279.

[10] Bogardus *v.* Rosendale Man. Co. & others, 3 Selden, 147. See also Morgan *v.* N. Y. & Albany Railway, 10 Paige, 290.

[11] Carr *v.* Le Fevre, 27 Penn. R. 413.

requirements of the act, for their release, have been strictly complied with. And if the act allows creditors to take certain proceeding, by way of notice, to stockholders, to prevent their release from liability, by the transfer of their stock, and such proceeding has been taken, the liability will continue.[12]

SECTION IV.

ASSIGNMENTS BY RAILWAYS, IN CONTEMPLATION OF INSOLVENCY.

§ 245. General assignment of property, by business corporations, for the benefit of creditors, giving preferences among them, but providing for the payment of all their debts, before any return to the company, have been held valid.[1] But such an assignment by a railway company was held void, under the insolvent laws of New York.[2]

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[12] Force *v.* Tanning & Leather Company, 22 Ga. R. 86.

[1] Warner *v.* Mower, 11 Vt. R. 385; Whitwell *v.* Warner, 20 Vt. R. 444, 445; Angell on Corp. § 191 and notes; 3 Wend. 13; 3 Barb. Ch. 119; 16 Barb. 280; 21 id. 221.

[2] Bowen *v.* Lease, 5 Hill, 221. But where no preferences are made, it is valid; but the franchise of the corporate action does not pass. Hurlburt *v.* Carter, 21 Barb. 221. See also Fellows *v.* Commercial & Railway Bank of Vicksburg, 6 Rob. (Louis.) R. 246; De Ruyter *v.* St. Peter's Church, 3 Comst. 238. This subject is very extensively discussed in the case of Curtis *v.* Leavitt, 15 N. Y. Court of App. 9, in regard to the North American Trust & Banking Co. Most of the points ruled are more or less affected by statutory provisions. But some may be of general interest.

It was held that a pledge of most of the assets of the company, when it was in fact insolvent, and known by the officers making the pledge, to be deeply embarrassed, if done by them in good faith, and with the honest expectation of continuing the business of the company and paying its debts, is valid, it not being done to prefer any of its creditors, in contravention of the provisions of the statute, but to enable the company to borrow money.

Where the statute prohibits the officers of moneyed corporations from conveying any of its effects, except in pursuance of a resolution of the board of directors, this does not hinder the corporation itself from directing or ratifying a conveyance, in any mode it may deem proper.

The duties of receivers of insolvent corporations under the New York statute, in winding up the concerns of such corporations are discussed here at length. It is held that the receivers represent and are subject to the disabilities of the corporation.

*CHAPTER XXXV.

BOARD OF TRADE. RAILWAY COMMISSIONERS.

SECTION I.

SUPERVISION OF RAILWAY LEGISLATION.

§ 246. It is well known, that from the first existence of railways, operated by steam, in England, the Board of Trade, which is a department of the executive government, have (except from 1846 to 1851, when their jurisdiction over railways was transferred to the Railway Commissioners, a distinct board created for that purpose) exercised a very extensive, and very important control, over the railway management in the country. This at one time extended to the supervision of all applications to parliament for legislation upon that subject, and resulted in the almost entire control of the railway legislation. As stated before, this jurisdiction was conferred upon a distinct board, denominated Railway Commissioners, from 1846 to 1851.[1] But in 1853, the report of the select committee of the House of Commons, upon the subject of railways, recommended, that the supervision of railway legislation be referred, in future, to a permanent standing committee, in the House of Commons, who, with the aid always attainable from the executive government, would prove a more satisfactory tribunal for the supervision of this subject, than the Board of Trade. This proposition was adopted, and seems to have met with acceptance. The Board of Trade still present, at the beginning of each session of parliament, a comprehensive report upon the general nature of the railway schemes for the year, and detailed reports upon the provisions contained in the several bills, which are required to be *furnished the board in advance of the meeting of parliament. A somewhat similar duty, is, in many of the American states, performed by Railway Commissioners. And such a board, if properly constituted, can

[1] 9 & 10 Vict. ch. 105; 14 & 15 Vict. c. 105.

scarcely fail to be of very essential service to the legislatures of the several states, whose sessions are short, and whose members are often inexperienced, both in the detail of general legislation, requisite for the proper management of railways, and especially with the devices sometimes resorted to, for the purpose of gaining unequal and unjust special legislation, in behalf of interested individuals, or corporations. But the benefit of such a board must depend chiefly upon its intelligence and independence. Without these it might become an instrument of wrong and injustice, more effective, perhaps, than an ordinary legislative committee.

SECTION II.

SUPERVISION OF RAILWAYS BY BOARD OF TRADE AND RAILWAY COMMISSIONERS.

1. *Proceedings in England, in opening railways.*
2. *Establish rules for connection.*
3. *Connection of branch railways.*
4. *Courts of equity will not interfere with decisions of Railway Commissioners.*
5. *English courts regulate railways for public accommodation.*

§ 247. 1. In England no railway, or any portion of it, can be opened for the public conveyance of passengers, until, upon proper notice from the company, it has been inspected and approved by the Board of Trade.[1] And if the officer inspecting the proposed railway shall report, that it is not in proper condition to be used with perfect safety to the public, the Board of Trade may, from time to time, postpone the opening, not exceeding one month at one time, until it shall appear, that such opening may take place, without danger to the public.[2] And railways are subjected to severe penalties, for opening their roads, without the proper order of the board. For the purpose of enabling the board to perform their duties, they have power, at all times, to enter upon railways, * and examine their works, and the companies' officers are subjected to penalties, for wilfully obstructing an officer of the board, in the discharge of such duty.

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[1] 5 & 6 Vict. c. 55; Hodges, 547, 554.

[2] And it is said, that although the board may have sanctioned the opening of one line of railway, they have authority to prohibit the use of an additional line [track?]. Attorney-General *v.* Oxford & Wolverhampton Railway, Weekly Report, p. 330, 1853–4. And the Board of Trade may originate prosecutions for violations of their orders. Hodges, 554.

2. And the board have authority to determine all questions in dispute, between different railways, in regard to their connections, so far as such questions relate to the safety, or convenience of the public, and to determine by whom the expenses, attending the arrangements, shall be borne.[3]

3. The Board of Trade have power also to determine, in what mode, land-owners adjoining railways, having the right to connect branch railways, with the main track of an existing railway, shall be allowed to exercise the same, consistently with the rights of the company, and the safety of the public. And where railways cross highways, or turnpikes, private ways, or tram ways, on a level, and the railway is willing to carry such way over, or under, their railway, by means of a bridge or arch, at their own expense, on the application of the company and hearing the parties, if it shall appear, that the level crossing endangers the public safety, and that the proposal of the company does not violate existing rights, without adequate compensation, the board may give the company power to build a bridge or make such other arrangements, as the nature of the case shall require.[4]

4. But in a recent case before the Lords Justices, upon appeal, it was held, affirming the decision of *Stuart*, V. C., that the Court * of Chancery had no power to review the decision of the Rail-

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[3] 5 & 6 Vict. c. 55, § 5 & 6 & 11; 3 & 4 Vict. c. 97, § 5 & 6; 7 & 8 Vict. c. 85, § 15. And where, by act of parliament, disputes between three different lines of railway, meeting at one point, in regard to the mode they should forward the traffic, coming from each other's lines, are to be settled by arbitration, upon the application of either party, upon fourteen days' notice, the arbitrators to have power to direct all measures, necessary for the accomplishing the desired object, it was held to come within the range of the powers of the arbitrators, to determine what trains should be run, and the speed, at which they should run, and the places of stopping, and that one company should carry the cars and carriages of the others, over their own line, and that it was not indispensable, that the arbitrators should fix the time for the continuance of their regulations, as either party might compel a new arbitration, at any time, by fourteen days' notice. The Eastern Union Railway *v.* The Eastern Co. Railway, 22 Eng. L. & Eq. R. 225. And a court of equity will interfere between two railways, entitled to the joint use of a station, by prescribing regulations for its management, but such interference ought not to take place, without grave occasion. The court may also direct a partition of the station and appoint a receiver, if necessary. But where provisions exist for the settlement of such disputes, by arbitration, the court will withhold its interposition, until that remedy has been resorted to.

[4] 5 & 6 Vict. ch. 55, § 13. *Ante*, § 108.

way Commissioners, whose office was not, that of mere arbitrators, but *quasi* judicial.[5]

5. And the courts of equity,[6] or by the late statutes, all the courts in Westminster Hall, have jurisdiction to determine questions, affecting the public accommodation, by means of imperfect railway connections. But they decline to interfere where there is every reasonable accommodation afforded, and there is no general complaint, although a single person claims further facilities, by means of different possible arrangements.[7]

SECTION III.

RETURNS TO BE MADE TO THE BOARD OF TRADE, OR RAILWAY COMMISSIONERS.

1. *May require companies to return traffic and accidents.*
2. *Third class trains and mail trains.*
3. *Time of completing roads.*

§ 248. 1. The Board of Trade, in England, have by statute power to require railways to make certain returns to them, upon subjects connected with the public interests, such as the aggregate traffic in cattle and goods respectively, and also in passengers, according to the several classes; the accidents occurring, attended with personal injury, and in some cases, such as are not.

2. The railway companies in England are required to convey passengers by third-class trains, at certain specified rates, and these trains, being intended for the public benefit, and to prevent exorbitant demands of fare, are under the control of the board. The speed of mail trains, within certain limits, is under the control of the board.[1]

3. The board have power, too, to extend the time for completing railways, fixed by their special acts, and for the compulsory

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5 Newry & Enniskillen Railway *v.* The Ulster Railway, 39 Eng. L. & Eq. R. 553.

6 17 & 18 Vict. c. 21.

7 Bassett *v.* The Great Northern & Great Midland Railways, 28 Law Times, 254, January, 1857; s. c. 38 Eng. L. & Eq. R. 218.

1 Hodges, 557, 558.

powers of taking land in certain cases, or to allow the abandonment of railways, or certain parts thereof, which are found not sufficiently remunerative, to justify their continued operation.[2]

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* CHAPTER XXXVI.

LEGISLATIVE SUPERVISION. POLICE OF RAILWAYS.

SECTION I.

OBLIGATIONS AND RESTRICTIONS IMPOSED BY STATUTE.

1. *The benefits, and necessity of legislative control.*
2. *Provisions of English statute, in regard to traffic.*
3. *Control of the gauge. Right of public to use railway.*

§ 249. 1. We have said something upon the subject of the power of the legislature to impose new obligations and restrictions upon existing railways.[1] We now propose to speak briefly upon the subject, as applicable to railways generally. Railways being a species of highway, and in practice, monopolizing the entire traffic, both of travel and transportation, in the country, it is just and necessary, and indispensable to the public security, that a strict legislative control over the subject should be constantly exercised. The difficulty is in knowing how to frame, and how to exercise, this control.

2. The English statutes, and especially the Railway and Canal Traffic Act, of 1854,[2] have attempted a very strict supervision. By section one, the word "*traffic*" is defined to include, not only passengers and their baggage, and goods, animals, and other things, conveyed by a railway or canal company, but also carriages, and vehicles of every description, used on such railway or canal. Section two requires such companies to use all people alike, in regard to the traffic, to facilitate travel, and transporta-

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[2] Hodges, 559, 560.
[2] 17 & 18 Vict. c. 31.
[1] *Ante*, § 232.

tion, upon connecting lines, to the utmost of their power, and to give every facility to the public, who wish to use such railway or canal. Section three *provides* that any party claiming to have suffered injury, in England, in violation of the act, may make a summary application to the Court of Common Pleas, in Westminster Hall, or any judge of such court, stating, in general terms, the nature of the grievance, who shall issue process to such company and try the accusation in the most summary mode, and after ascertaining the true state of the facts, by the aid of engineers, barristers, or other fit persons, are to give judgment, and carry the same into effect, by means of an injunction, mandatory, or prohibitory, as the case may be. This remedy is merely cumulative, and does not deprive the party of any redress to which he was entitled before, or in any other mode.

3. The English statutes provide that the gauge of railways shall be uniformly four feet eight inches, throughout Great Britain, and five feet three inches, in Ireland.[3] The Railways Clauses Consolidation Act provides in detail, for the use of railways, by all persons who may choose to put carriages thereon, upon the payment of the tolls demandable, subject to the provisions of the statute,[4] and the regulations of the company. The view originally taken of railways in England, evidently was, to treat them as a common highway, open to all, who might choose to put carriages thereon.[5] But in practice it is found necessary, for the safety of the traffic, that it should be exclusively under the control of the company, and hence no use is, in fact, made of the railway by others.[6]

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[3] 9 & 10 Vict. c. 57. [4] 5 & 6 Vict. c. 55.

[5] The King *v.* Severn and Wye Railway, 2 B. & Ald. 646, where the Court of King's Bench, by writ of mandamus, compelled a railway company, who were about to take up the rails on their road, to restore them, and to keep the road in a proper state for the public use. The Queen *v.* Grand Junction Railway, 4 Q. B. 18, 38.

[6] Queen *v.* London and S. W. Railway, 1 Q. B. 558.

SECTION II.

REGULATION OF THE RUNNING OF CARS OR TRAINS, BY MUNICIPAL AUTHORITY.

1. *May prohibit the use of steam power in streets.*
2. *May do this by virtue of their general control of police.*
3. *Police during construction of railways in England.*
4. *Right of municipalities to make railway grants.*

§ 250. 1. It has been held, that a statute, giving power to the common council of a city, to regulate the running of cars, within *the corporate limits, authorizes the adoption of an ordinance, entirely prohibiting the propelling of cars by steam, through any part of the city.[1]

2. We should entertain no doubt of the right of the municipal authorities of a city, or large town, to adopt such an ordinance, without any special legislative sanction, by virtue of the general supervision, which they have over the police of their respective jurisdictions. Such must have been the opinion of the court, in the case last referred to.[1] *Nelson*, Ch. J., says, "A train of cars, impelled by the force of steam through a populous city, may expose the inhabitants, and all who resort thither, for business or pleasure, to unreasonable perils; so much so, that unless conducted with more than human watchfulness, the running of the cars," [in that mode,] "may well be regarded as a public nuisance."

3. By general statute, in England, the railway companies are to bear the expense of a reasonable police force, during their construction, and as long as workmen are employed in completing any works on, or connected with, the railway.[2]

4. An important case[3] occurred in the city of New York, in regard to the power of the common council to grant the use of the streets to natural persons, having no legislative grant for that

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[1] Buffalo and Niagara Falls Railway *v.* The City of Buffalo, 5 Hill (N. Y.) R. 209. See also State *v.* Tupper, Dudley (S. C.) R. 135.

[2] North British Railway *v.* Horne, 5 Railw. C. 231. In this, and in some other cases, the provision is contained in the special act.

[3] Attorney-General of New York *v.* The Mayor and Aldermen of the City of New York, 3 Duer, 119.

purpose, for a railway, for the transportation of passengers, by horse-power. The case was an application to the Superior Court, for an injunction against the defendants, to restrain them from making the grant. The defendants having in the first instance disregarded the preliminary injunction, and passed the grant, which was accepted in writing, by the grantees, the grantees were also made parties defendants.

"Held, that a grant of the powers, privileges, and immunities, conferred by the resolution in question, is the grant of a franchise, and if the municipal incorporation of this city was incompetent to make the grant, the making of it was a usurpation of power which can lawfully be exercised by the legislature of the state only.

"That neither of the city charters, nor any statute of the state, *confers power, in express terms, to make such a grant. That the existence of such a power cannot be implied as being necessary to the exercise of any power expressly granted, or the performance of any duty enjoined by law.

"That no corporation, municipal or otherwise, possesses any powers, except such as have been granted to it.

"That the resolution in question, when duly passed by the common council, and accepted by the grantees in the mode it prescribed, was not a law or ordinance repealable at the pleasure of the corporation, but a contract, within the meaning of that clause of the constitution of the United States which prohibits every state legislature from passing any law impairing the obligation of contracts.

"That after being passed and accepted, so long as its conditions should be complied with, there being no power reserved in it to rescind or modify it, the corporation, if legally competent to pass it, would be incompetent to repeal it at its mere will and pleasure, so as to divest any rights of property acquired by the grantees under it.

"That the legislative power of a corporation is restricted by the constitutional and statute law of the state in which it is located, and that no state can grant to a corporation power to do that, which the constitution of the United States prohibits it from doing itself.

"That the municipal corporation of this city cannot divest itself of, nor abridge its legislative discretion and duty, to alter

and regulate the streets, as it may deem the public good requires. Nor can it prohibit such use of the streets by its inhabitants, as is granted by a law of the state to every citizen as a matter of strict right.

"That the resolution in question is void, on the grounds: —

"1. That it grants a franchise, which the common council has no authority to grant.

"2. The grant, by the meaning and legal import of its terms, may be perpetual.

"3. The grant, in judgment of law, is a contract between the corporation and the grantees, and in its legal import, restricts the corporation in the future exercise of its legislative powers.

"4. It confers upon the grantees and their associates, exclusive privileges, to a partial use of Broadway, which may be of perpetual duration.

*"5. It absolves them from an obligation imposed on them by a statute of the state. (2 Rev. Stats. 424, § 198.)

"6. It confers rights, and exempts the associates from consequences, in the event of the death of one of their number, repugnant to and in conflict with the settled law of the state.

"7. It authorizes the grantees and their associates, however small may be their number, to become incorporated at any time, under the General Railroad Act, although the road may have been previously constructed, while the act itself does not allow an incorporation, after a road shall have been built, nor of a less number than twenty-five persons.

"8. The grant and its acceptance constitute a contract, which the common council is prohibited from making, by the amended charter of 1849.

"9. The making of a grant by a municipal corporation, conferring such privileges and immunities, without lawful authority, being a usurpation of power, and the illegal exercise of a franchise, may be enjoined by any court having jurisdiction of the subject-matter, and of the necessary parties."

From the newspaper reports of the decisions of the Court of Appeals, in January, 1857, we infer, that the judgment in this case was reversed, but upon grounds not affecting the merits of the question. And although some of the judges intimate an opinion, that it is competent for the municipal authorities of the city, to grant a railway, in the streets of the city, provided it be

not a franchise, or monopoly, and be equally open to all the citizens, the court held, that they have not power to grant the franchise, for a railway. This may be true in the abstract. For the public authorities may doubtless lay down rails in the highways or streets, and allow all who choose, to travel upon them with their own cars or carriages. And this must be substantially what is here indicated, we apprehend. But no such grant was here intended. And practically no one would accept of any such grant. The decision must, therefore, as to the law, be regarded, as virtually affirmed.

*SECTION III.

CARRYING MAILS, AND TROOPS AND MUNITIONS OF WAR.

1. *In England this is controlled by legislation of the nation.*
2. *The division of sovereignty creates difficulty on that point.*
3. *But it would seem that the state and national legislatures may control it.*
4. *Mail agents may sue company for injury, in England.*
5. *Same rule adopted in this country.*

§ 251. 1. In England the sovereignty being one, and indivisible, there is no doubt of the right to require the aid of the railways of the kingdom, upon such terms, as a disinterested umpire may adjudge reasonable, in the transportation of the mails, and of troops, and munitions of war.

2. The subject is embarrassed, in this country, by the division of the sovereignty, into state, and national, such companies deriving all their corporate powers from the state. And the transportation of the mails, as well as troops and the munitions of war, in time of peace, being exclusively a national interest, it has been sometimes supposed, that the national government, was altogether at the mercy of the railways, in regard to this species of transportation, except, that they might claim to pass upon the same terms, as other passengers and freight. The matter of the transportation of troops, in time of peace, is one of small importance, and where no serious abuse is likely to intervene. And in time of war, all the resources of the nation are, of course, subject to the control of the national government.

3. But the transportation of the mails is one of constant expenditure, and of vast importance, in the aggregate. But as the matter has not been discussed in the judicial tribunals, either of

the states, or nation, we cannot pretend to shed much light upon it. It would seem wonderful, if the legislatures of the states, and of the union, have not the power to control the subject, to the same extent, as the British parliament, by general legislation. And accordingly it will be found, that many of the states, in their general railway acts, have introduced provisions, requiring the railways to transport the mails, upon reasonable terms, and providing for an umpirage, where the parties do not agree.

4. In England, it has been held, that the officers of the post-office, who are required to be in charge of the mail, during its transportation, may have an action against the railway company, * transporting the same, for any injury sustained, through their negligence, although there subsist no contract, between the parties, and none, in any form, except for the transportation of the mails, with the proper incidents connected therewith, and the injury was received, while in the performance of their official duty, in charge of the mails.[1]

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[1] Collett *v.* London & North W. Railway, 6 Eng. L. & Eq. R. 305. Lord *Campbell*, Ch. J. here says: "The duty does not arise from any contract with the plaintiff, but from the obligation imposed by the legislature, upon the company, to carry the mail-bags, and the officers of the post-office in charge of the letters. If it be the duty of the company to carry the plaintiff, at all, it must be their duty, in doing so, to use reasonable care and skill."

That the establishment and maintenance of public posts, is an exclusive prerogative of sovereignty, is a proposition admitting of no question. The history of the establishment of public posts, for the conveying public intelligence, and for other purposes, connected with governmental administration, is curious.

They are mentioned as having been established, in the Persian empire, as early as the time of Cyrus, (Xen. Cyrop. lib. 8;) and in Rome, in the time of Augustus, (Suet. in Vit. Aug. c. 49.) Plutarch, in his life of Galba, mentions, that the magistrates were obliged to furnish horses for this service, upon proper requisition. And the younger Pliny, in writing the emperor Trajan, apologizes for having resorted to the use of the public post-chaises, under his charge, for private purposes, in a case of painful emergence, the death of a near family relative; and where he desired to have his wife pay her condolence to the surviving members of the bereaved family, in the freshness of their grief. The emperor's reply is a model of state papers, brief and pertinent. Book X., Letter 122. Louis XI., it is said, first established them in France, in 1474; and it was not till the 12th of Charles II. that the post-office was established in England, by act of parliament.

The history of the subject shows, that it has always been regarded, as one of the rights pertaining to sovereignty, and that the citizen, or subject, felt bound to lend all requisite aid, in its accomplishment. That the sovereign should be at

5. Almost precisely the same point was decided in a late case[2] in New York, in regard to the United States mail agent, who was injured, while on board the company's cars, in the discharge of his official duties, in charge of the United States mail, there being no contract for carrying plaintiff, except with the government, and in connection with carrying the mail. The decision of the court is expressed in the language of Lord *Campbell*, Ch. J., in the case of Collett *v.* London & N. W. Railway.

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* CHAPTER XXXVII.

THE CONSOLIDATION OR AMALGAMATION OF COMPANIES.

SECTION I.

THE POWER OF THE LEGISLATURE TO COMBINE COMPANIES.

§ 252. THERE seems to be no question made in England of the power of different railway companies, or railway and canal companies, to amalgamate, or combine their interests and their stock, by agreement, with the consent of parliament under a special act. This is every day practice there, and seems to be a very useful and just mode of arranging the business of different lines, or the same continuous line often, where competition is liable to do harm, both to the traffic, and the shareholders. Some few questions, of no great importance, have already been decided upon this subject. In a case where two canals were combined with the grant of a railway, and the railway company were, by the special act, to pay the canal companies a specified price per share for all their shares, "from and immediately after the opening of the railway, from A. to G. for public use;" the railway being so opened, the whole length of the Grantham Canal, but not the whole line, as specified in the act, the remaining portion

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the mercy of the citizen, in this respect, involves the same inconsistency, as that it should be so in regard to the other rights of eminent domain.

[2] Nolton *v.* Western Railway, 10 How. Pr. R. 97.

being that which competed with the Nottingham Canal; the Grantham Canal brought an action for the price of their shares. It was decided, in the court below, that no recovery could be had, until the whole railway was opened for public use, according to the terms of the act.[1] But in the same case in the Exchequer Chamber,[2] it was decided, by a divided court, that the railway being opened, so far as competed with the *G. canal, it was the fair import of the act, although containing no distributive words, that each canal company might recover its several interest, whenever the railway was fully opened, as to competition with their interests.[3]

But in this country it seems to be regarded as indispensable, under the restriction in the United States constitution, that the consent of all the shareholders, to the amalgamation of different companies, should be obtained.[4] But except in the case of unpaid subscriptions, and analogous matters, the shortest acquiescence of the stockholders, in the combination of different companies, by act of the legislature, will be likely to be held, by the courts, as conclusive of their right to interfere.[5]

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[1] Grantham Canal Co. *v.* Ambergate, Nottingham & Boston & Eastern J. R. 6 Eng. L. & Eq. R. 328.

[2] 12 Eng. L. & Eq. R. 439.

[3] This seems to be a very just and reasonable decision, but not altogether consistent with the terms of the act. But it is a striking illustration of the strong inclination of the English courts, both of law and equity, ordinarily, to escape from merely verbal and technical obstructions to the attainment of the full justice of the case.

[4] Fisher *v.* Evansville & Crawfordville Railway, 7 Porter (Ind.) R. 407. See also, Kean *v.* Johnson, 1 Stockton, Ch. R. 405–424, for an elaborate opinion upon this subject, where the special master, sitting for the chancellor, arrives at the conclusion, that the legislature have no power to consolidate different railway companies, without the consent of all the shareholders, and as the statute provides, that nothing therein contained should affect "any right whatever," it should receive the construction, that the consolidation provided for should be effected, in the only practicable mode known to the law, which would not affect rights, i. e. by the consent of all the shareholders. Chapman *v.* M. R. & L. E. R. & S. & Ind. Railway, 6 Ohio St. R. 119. The act of amalgamation is not void, but voidable at the election of shareholders. McCray *v.* The Junction Railw. 9 Ind. R. 358. Stock subscriptions are thereby released. Ib.

[5] Chapman & Harkness *v.* Mad River & Lake Erie Railway, and Sandusky City & Indiana Railway, 6 Ohio St. R. 119. Two companies cannot consolidate their funds, or form a partnership, unless authorized by express grant of the legislature, or necessary implication. N. Y. & Sharon Canal Co. and Sharon Canal

SECTION II.

WHAT AMOUNTS TO AN AMALGAMATION OF RAILWAY COMPANIES.

1. *Mere association or alliance not sufficient.* | 2. *Agreement to amalgamate from a day past.*

§ 253. 1. It has been held that one railway company associating, allying, and connecting itself with another, in regard to traffic, *in which they have a common interest, does not amount to an amalgamation between the two companies.[1] An amalgamation seems to imply such a consolidation of the companies, as to reduce them to a common interest.

2. An agreement to amalgamate from a day past seems to be considered, in equity, as an actual amalgamation, from that time. But an agreement to do so, from a future time, cannot amount to an amalgamation until the time arrive.[1]

SECTION III.

WHAT CONTRACTS MADE BEFORE AMALGAMATION ENFORCED AFTERWARDS.

1. *Where the amalgamation is legal, all prior contracts may be enforced.*
2. *But where any formalities are not complied with, it is otherwise.*
3. *Admissions by the company contracting, good against consolidated company.*
4. *Consolidated company may apply funds to pay debts of former companies.*
5. *Instance illustrating the right to amalgamate.*

§ 254. 1. Where the amalgamation is strictly legal, and no impediment arises in regard to the form of the remedy, it would seem a contract, made before amalgamation, should be capable of being enforced after. And where a clerk to a railway company had executed a bond, with surety, for the faithful discharge of his duty to one company, which was subsequently amalgamated, by act of parliament, with another railway company, saving

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Co. *v.* Fulton Bank, 7 Wendell, 412. The majority of a corporation, cannot bind the minority, by the acceptance of a fundamental alteration of their charter. *Ante*, § 56. See Macon & Western Railway *v.* Parker, 9 Ga. R. 377.

1 The Shrewsbury & B. R. *v.* Stour Valley, and The London & N. W. R. 21 Eng. L. & Eq. R. 628; Midland G. W. R. of Ireland *v.* Leech, 28 Eng. L. & Eq. R. 17.

to the consolidated company all remedies upon contracts to either, it was held an action will lie upon such bond.[1] So, too, such bond is good security to the new company, for the faithful conduct of such clerk in the employ of such new company.[2]

2. But where the amalgamation is illegal, calls cannot be enforced, or if the provisions for the amalgamation had not been fully carried into effect, no suit for calls in the name of the new company can be sustained.[3]

3. And in an important case, in the United States Supreme Court,[4] it seems to have been held, that in an action against the amalgamated company, upon a contract for construction, made by one of the consolidated companies, the admission, or act of the company, making the contract, will bind the aggregate company, by way of estoppel *in pais*.

4. And where a railway and canal company were formed, by the union of several ancient canals, and three railway companies, and power was given to the united companies to issue new shares, for the purpose of raising capital, it was held no misapplication of the funds of the new company, to apply them first to the payment of a large debt of one of the canal companies.[5]

5. Where the preliminary contracts, by which two railway companies were set on foot, each provided, that the managing committees, or directors, might "demise or sell the undertaking, or any part thereof, or amalgamate the same or any part thereof, *with any other railway*, or railways, and the directors of the two companies made, and carried into effect, an amalgamation of the two companies, which necessarily interfered with each other's business, it was held, that the amalgamation of these two companies came fairly within the preliminary contracts, and that an action for calls might be maintained against any shareholder in either company, who had executed the preliminary contracts."[6]

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[1] London, Br. & S. C. Railway *v.* Goodwin, 3 Exch. R. 320; s. c. 6 Railw. C. 177. And the same point is so ruled in Eastern Union Railway *v.* Cochrane, 24 Eng. L. & Eq. R. 495. In the former case the breach was committed before, and in the latter, after the amalgamation.

[2] Eastern Union Railway Co. *v.* Cochrane, 24 Eng. L. & Eq. R. 495.

[3] Midland G. W. Railway of Ireland *v.* Leech, 3 House L. Cases, 872; s. c. 22 Eng. L. & Eq. R. 45; *ante*, § 56.

[4] Philadelphia, Wilmington, and Baltimore Railway *v.* Howard, 13 How. R. 307.

[5] Cooper *v.* The Shropshire Union Railway and Canal Co. 6 Railw. C. 136.

[6] Cork and Yougal Railway *v.* Patterson, 18 C. B. 414. See *ante*, § 56, n. 1.

*CHAPTER XXXVIII.

MISCELLANEOUS MATTERS.

SECTION I.

JURISDICTION OF THE UNITED STATES COURTS.

§ 255. CONTRARY to the earlier decisions of the United States courts, it is now settled, that a corporation is to be regarded, as a "citizen" of the state, where it exists, and as such may be sued, in that circuit, by a citizen of any other state.[1]

And it makes no difference, that the shareholders, and members of the corporation, reside in different states, as it is the artificial being, created by the act of incorporation, which is the party, and not the corporators.[2]

But a railway company cannot be said, either at law, or in equity, to reside in a different district from the one where it exists, and was chartered. Nor can a circuit court of the United States take cognizance of a controversy in one district or state, where the subject-matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the locality of the controversy.[3] This was the case of a railway in Indiana, entering into an agreement with a railway in Michigan, to allow *them to build and operate their road, under their charter. Another railway company in Indiana, claiming that their rights were being infringed, filed a bill in equity, in the United States district court for the district of Michigan, to enjoin

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[1] Marshall *v.* Baltimore and Ohio Railway, 16 How. 314. Mr. Justice *Grier*, in giving the opinion in this case, cites the case of Louisville, Cincinnati, & Charleston Railway *v.* Letson, 2 How. 497, as having virtually decided the question, and, as having been so regarded and recognized, by the profession and the court. See also Works *v.* Junction Railway, 5 McLean, R. 425; Culbertson *v.* Wabash Nav. Co. 4 McLean, R. 544.

[2] Louisville Railway *v.* Letson, 2 Howard, R. 497. See also *ante*, § 20, and cases cited.

[3] Northern Indiana Railway *v.* Michigan Central Railway, 15 How. U. S. 233. See Wheedon *v.* Cam. and Amboy Railway (Sup. Court of Penn.); January No. 1857, Law Reg. p. 296.

the company in that state, who were proceeding under the contract, without making the other party to the contract a party to the bill. The circuit court upon hearing, dismissed the bill, and the supreme court affirmed the decree. The supreme court held also, that the other party to the agreement was a necessary party to the bill.

In a suit in Indiana, in the circuit court of the United States, between the same parties, it was held that a corporation is not amenable to process, except in the state, where its business is done. A corporation in Indiana cannot sue, in that state, a corporation doing business in the state of Michigan. Where the subject is essentially local, the action must be brought in the state where the injury is done.[4]

It has been held, that an insurance company, chartered by one state, and having its principal place of business there, is to be regarded as a citizen of that state, for the purpose of maintaining suits, or being sued, in the circuit courts of the United States.

But it was also held, in this case, that a judgment recovered against such company in another state, by service of process upon an agent of the company, doing business there, on behalf of the company, and who was permitted, so to transact such business, by consent of the legislature of that state, upon condition that service of process upon such agent should be regarded, as service upon the company, was a valid judgment, and entitled to the same consideration, in the state where the company was located, as in the state where rendered.[5]

SECTION II.

LIABILITY FOR DOING AN ACT PROHIBITED BY THE COMPANY'S CHARTER, WITHOUT SPECIAL DAMAGE TO THE PARTY INTERESTED.

§ 256. Where the owner of a ferry across the river Mersey was protected in his rights, by a section in the special act of a railway,

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[4] Northern Ind. Railway *v.* Mich. Cent. Railway, 5 McLean's C. C. R. 444. See also Woolsey *v.* Dodge, 6 id. 142.

[5] Lafayette Insurance Co. *v.* French, 18 How. R. 404. In a recent case before the House of Lords, the question was determined, that an English railway company may be sued in Scotland, by process of foreign attachment. London & Northwestern Railw. *v.* Lindsay, 30 Law Times, 357.

prohibiting the company, from extending their road across the river, until certain other works were finished, it was held, that he might maintain an action against the railway company, for violating such provisions of their act, which were obviously inserted for his protection only, and not with any reference to the public interests, without showing the special damage he had thereby sustained.[1]

*SECTION III.

MODE OF RECKONING TIME.

§ 257. By the English statute, twenty-one days are allowed the shareholders, after notice of the making of calls, in which to make payment. This means twenty-one clear days, exclusive of the first and last days.[1] But it is questionable whether the same construction would be applied to a similar provision, in this country, unless the terms of the statute were very explicit, in that direction. The more common mode, in this country, in reckoning time, specified in a statute, is to exclude the day from which the period is reckoned, and to include the day of its accomplishment.[2]

SECTION IV.

SERVICE OF PROCESS UPON NON-RESIDENT COMPANIES.

§ 258. Where a statute provided, that unless the company designated some agent, within certain precincts, upon whom service might be made, it should be competent to summon the company, by service upon any officer, superintendent, or managing agent of the company, within the precinct, and service was made upon the freight agent of the company, it was held competent for the company to defeat the service and the jurisdiction of the court, by showing that they had a director, within the precinct upon whom service should have been made.[1]

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[1] Chamberlaine *v.* Chester Railway, 1 Exch. R. 870.

[1] *In re* Jennings, 1 Irish Eq. R. (N. S.) 236; Hodges, 107.

[2] Bigelow *v.* Wilson, 1 Pick. R. 485, opinion of *Wilde*, J.

[1] Wheeler *v.* New York & Harlaem Railw. 24 Barb. 414; *Ante*, § 255, n. 5.

*APPENDIX A.

CHAPTER II.

PUBLIC RAILWAYS.

PRELIMINARY ASSOCIATIONS.

SECTION I.

MODE OF INSTITUTING RAILWAY PROJECTS.

§ 2. The mode of instituting railway enterprises, in England, is more formal, and essentially different, from that adopted in most of the American states. There the promoters usually associate, under two provisional deeds, the one called a "Subscribers' Agreement," and the other a "Subscription, or Parliamentary Contract," which are expected only to serve as the basis of a temporary organization, till the charter is obtained. This is specifically and often in detail, to some extent, provided for, in the subscribers' agreement. A board of provisional directors is provided, to carry forward the enterprise, whose powers are defined in the subscribers' agreement, or deed of association, and whose acts will not bind the members, unless strictly within the powers conferred by the deed.

Under this form of association the subscribers are bound, by the act obtained, if within the powers conferred by the deed, even where it involves the purchase of canal, and other property, by the company.[1] And courts of equity often interfere to restrain the *provisional directors, from exceeding their powers under the deed,[2]

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[1] Midland Great Western Railway *v.* Gordon, 16 M. & W. 804.

[2] Gilbert *v.* Cooper, 4 Railw. C. 396. All parties concerned must be made parties to the bill, even shareholders of whom it is alleged a rival company propose to purchase shares, to destroy the independence of one of the companies, connected with the common enterprise. Greathed *v.* S. W. & Dorchester Railway, 4 Railw. C. 213.

or misapplying the funds, or delaying payment of the debts of the association.[3]

The provisional directors usually issue scrip certificates, which pass from hand to hand, by delivery merely, and after the charter is obtained, the scrip-holders are registered, as shareholders in the company, and thereby become entitled to all the rights, and subject to all the liabilities of the shareholders.[4]

And if the original subscriber sell the scrip to one, who omits to have his name registered as a shareholder, by reason of which the original subscriber cause his name to be registered, and sell the shares again, he will be held to account for the avails of the second sale, as a trustee for the first purchaser.[5]

But the company are not obliged to accept of the holders of scrip, as shareholders, in discharge of the original subscribers, it has been said, but may insist upon registering the original subscribers to the deed of association, to whose aid it may be presumed the promoters looked in undertaking the enterprise, which by their act of incorporation they are morally, and in some cases legally, bound to carry forward.[6] But the English decisions, upon the whole, hardly seem to justify this proposition. The subscriber cannot abandon the obligation at will.[7] But if the scrip is *transferable, by delivery, it would be strange, if the holder was not entitled to be registered, as a shareholder, the same, as the assignee of a fully registered share in the stock. And for the company, after having issued scrip certificates, in a

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[3] Lewis *v.* Billing, 4 Railw. C. 414; Bagshawe *v.* Eastern Union Railway, 6 Railw. C. 152; S. C. 7 Hare, 114; Bryson *v.* Warwick & Birmingham Canal Co. 23 Eng. L. & Eq. R. 91. In this last case, the railway company being only provisionally registered, expended £10,000 in the purchase of the stock of the defendants. The railway finally failing to go into operation, in the process of winding up, one of the shareholders was allowed to institute proceedings in equity, on behalf of himself and others, being shareholders, to compel defendants to refund the money, and the court held the contract illegal, and compelled the defendants to refund the money received under it.

[4] *Ante*, § 47; Birmingham, B. & Th. J. Railway *v.* Locke, 1 Q. B. 256; London Grand J. Railway *v.* Graham, id. 271; The Cheltenham & G. W. U. Railway *v.* Daniel, 2 Railw. C. 728; Sheffield & A. & M. Railway *v.* Woodcock, 2 Railw. C. 522.

[5] Beckitt *v.* Bilbrough, 19 Law J. 522; 8 Hare, 188.

[6] Hodges on Railways, 97.

[7] Kidwelly Canal Co. *v.* Raby, 2 Price, 93; Great North of Eng. Railway *v.* Biddulph, 2 Railw. C. 401, where the question is raised, but not determined.

form calculated to invite purchases, and when they were aware of the use constantly made of such scrip, to refuse to register the names of the holders, as shareholders, and members of the company, would amount to little less, than express fraud. Hence we conclude they have no right to decline accepting such scrip-holder, as a shareholder.[8] But where false scrip had been issued, beyond the amount allowed in the charter, and the full number of shares, allowed by the charter, already registered, it was held the company could not, upon that ground, refuse to register the shares of such, as had purchased the genuine scrip.[9] But we have had occasion to say more upon this subject elsewhere.[10]

By the laws of some of the states a given number of persons associating, in a prescribed form, for particular purposes, as religious, manufacturing, and banking purposes, and often for any lawful purpose, are declared to be a corporation. In such cases no application to the legislature is required. But generally, railways in this country, have obtained special acts of incorporation. There is, in most of the states, no provision for any preliminary association, and these enterprises are, for the most part, carried forward, by individuals, or partnerships, and questions arising, in regard to the binding force of the acts of the promoters, either upon, or towards the corporation, must depend upon the general principles of the law of contract.[11]

By the general law of some of the states, the petitioners are required to furnish surveys of the proposed route, properly delineated upon charts, by competent engineers, with estimates, and other information requisite for the full understanding of the subject. And these profiles and plans are required, where the petition is granted, to be deposited in some public office, for inspection and preservation.[12]

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[8] Midland G. W. Railway *v.* Gordon, 5 Railw. C. 76.

[9] Daly *v.* Thompson, 10 M. & W. 309.

[10] *Ante*, § 39, 47.

[11] Angell & Ames on Corporations, § 86–94.

[12] Laws of Mass. 1833, ch. 176; 2 Railroad Laws & Ch. 616; Ib. 657; Laws of Mass. 1848, ch. 140; Laws of Rhode Island, 1836; 2 Rail. Laws & Ch. 838; Laws of Conn. 1849, ch. 37; Ib. 1153; Rev. Statutes of Maine, ch. 81, § 1; 1 Rail. Laws & Ch. 305. Similar provisions exist in many of the other states. But they are very general, and ordinarily the plans furnished are so imperfectly made, as not to afford much protection to land-owners. And a compliance with these requirements not being, in any sense indispensable to the validity of special

*SECTION II.

CONTRACTS OF THE PROMOTERS NOT BINDING AT LAW, UPON THE COMPANY.

§ 3. The promoters of railways, in this country, where the law makes no provision, for the preliminary association becoming a corporation, can only bind themselves, and their associates, at most, by their contracts.[1] The promoters are in no sense identi-

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acts, they are probably not very strenuously enforced by legislative committees, especially in cases, where opposition is not made to the new incorporation, which is not very common, unless the project interferes with some rival work.

[1] Moneypenny *v.* Hartland, 1 C. & P. 352. *Abbott*, Ch. J., said: "Before an act passes for such a work, as this, the surveyors and other persons employed on it, look to the committee, or body of adventurers, who first employ them." S. P. Kerridge *v.* Hesse, 9 C. & P. 200; Doubleday *v.* Muskett, 7 Bing. R. 110. And one who attends the meetings of such preliminary association, and takes part will ordinarily be precluded from denying his liability as a partner. Harrison *v.* Heathorn, 6 Man. & Gr. 81; Sheffield, Ash. and M. Railway *v.* Woodcock, 7 M. & W. 574. If the defendants have suffered themselves to be held out, as partners in the enterprise, and engaged in carrying it forward, and others have performed service for the association, upon their credit, they are liable. Wood *v.* The Duke of Argyll, 6 Man. & Gr. 928; Steigenberger *v.* Carr, 3 id. 191. But express proof is required of authority from the partners, or of a necessity to draw bills, in the conduct of the business, to justify the directors in drawing bills on the credit of the association. Dickinson *v.* Valpy, 10 B. & C. 128. From the foregoing cases, and Bell *v.* Francis, 9 C. & P. 66, and some others, it would seem, that the directors and managing committee are always liable, for services rendered such associations, on their employment and credit, and that such other members of the association are liable also, as the terms of the association, or their own active agency in the employment of servants and agents, fairly justify such employees in looking to, for compensation. *Post*, § 4, n. 8.

In regard to admissions made by provisional committee-men, and others, who have taken part in instituting railway projects, some allowance is made in the English courts, for probable mistakes and misapprehensions, by those not well acquainted with the liabilities of such persons. Newton *v.* Belcher, 6 Railw. C. 38; s. c. 12 Q. B. 921. And where others have not acted upon such admissions, the party has been allowed to show, that they were made under mistake, either of law, or fact, and if so, the party has been held not to have incurred any additional liability thereby. Newton *v.* Liddaird, 6 Railw. C. 42; s. c. 12 Q. B. 925.

The rule laid down by *Bailey*, J., in Heane *v.* Rogers, 9 B. & C. 577, upon this subject, is here expressly recognized by Lord *Denman*, Ch. J. "The general doctrine laid down in Heane *v.* Rogers, that the party is at liberty to prove, that his admissions were mistaken, or untrue, and is not estopped, or concluded by them, unless another person has been induced by them to alter his condition, is

cal *with the corporation, nor do they represent them, in any relation of agency, and their contracts could of course only bind the company, so far as they should be subsequently adopted by it, as their successors, much in the same mode, and to the same extent, and under the same restrictions and limitations, as the contracts of one partnership bind a succeeding partnership, in the same house.

But a contract by a joint-stock association, that each member shall pay all assessments made against him, cannot be enforced, by a corporation subsequently created, and to which, in pursuance of the original articles of association, the funds and all the effects of the former company have been transferred.[2] Nor is the act of all the corporators even, the act of the corporation, unless done in the mode prescribed, by the charter and general laws of the state.[3] Nor can an incorporated company sustain an action, at law, upon a bond executed to a preliminary association, by the name of the individuals and their successors, as the governors of the Society of Musicians, for the faithful accounting of A. B., their collector, to them and their successors, governors, &c. the company being subsequently incorporated.[4]

SECTION III.

SUBSCRIBERS TO THE PRELIMINARY ASSOCIATION INTER SESE.

§ 4. The project for a railway being set on foot by a provisional committee of directors, or managers, the subscribers may insist *upon the terms of subscription. The subscribers are not

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applicable to mistakes, in respect of legal liability, as well as in respect of fact." And this estoppel, it was held in the principal case, only extends to parties and privies, to the particular transaction, in which the admission was made, and that third parties, having no interest in it, either originally, or by derivation, can claim no benefit from it. This is in accordance with the established principles of the law of evidence, at the present time. See the opinion of the court in Strong *v.* Ellsworth, 26 Vt. R. 366.

[2] Wallingford Manufacturing Co. *v.* Fox, 12 Vt. R. 304; Goddard *v.* Pratt, 16 Pick. 412, where it is held, the original copartners are still liable, upon contracts made with third parties, ignorant of the dissolution, by the incorporation, the company having carried on business in the name of the partnership.

[3] Wheelock *v.* Moulton, 15 Vt. R. 519.

[4] Dance *v.* Girdler, 4 Bos. & P. 34. See Gittings *v.* Mayhew, 6 Md. R. 113.

bound by any special undertaking of the directors, or any portion of them, beyond, or aside of the powers, conferred by the terms of the deed, or contract of association.[1]

And the association is not binding, until the provisions by which it is, by its own terms to become complete, are complied with. If before that, the scheme be abandoned, the provisional subscribers, or allottees, may recover back their deposits of the provisional committee, in an action for money had and received.[2] So, too, if one is induced to accept of shares, in the provisional company, by fraudulent representations, he may recover back the whole of his deposits.[3]

But if one actually become a subscriber, he is bound by the terms of subscription, without reference to prior oral representations, and must bear a portion of the expense incurred, if the subscription so provide.[4] But if the directors, in such provisional company, in order to induce subscriptions, promise the subscriber, that in the event of no charter being obtained, he shall be repaid his entire deposit, this contract is binding upon them, and may be enforced, by action, notwithstanding the subscriber's agreement authorized the directors to expend the money in the mode they did.[5]

But the contract of the directors will not excuse the subscriber from paying calls, if the terms of the subscriber's agreement require it.[6] The contract of the directors in such case, and the deed of association, are wholly independent of each other, and neither will control the other.[7]

But it has been held, that persons, by taking shares in a projected railway, do not bind themselves to pay any expense incurred, unless it is so provided in the preliminary contracts of

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1 Londesborough *ex parte*, 27 Eng. L. & Eq. R. 292; *Ex parte* Mowatt, 1 Drewry, 247.

2 Walstab *v.* Spottiswoode, 4 Railway C. 321.

3 Jarrett *v.* Kennedy, 6 C. B. 319.

4 Watts *v.* Salter, 10 C. B. 477. And if one subscribe the agreement, and parliamentary contract, he will be liable, although he have not received the shares allotted to him or paid the deposits. *Ex parte* Bowen, 21 Eng. L. & Eq. 422.

5 Mowatt *v.* Londesborough, 25 Eng. L. & Eq. R. 25; s. c. in error, 28 Eng. L. & Eq. R. 119; Ward *v.* Same, 22 Eng. R. 402.

6 *Ex parte* Mowatt, 1 Drewry, 247.

7 Dover & Deal Railway, *ex parte* Mowatt, 19 Eng. L. & Eq. R. 127.

association, or the expense is incurred, with their sanction, and upon their credit.[8] And *even where such shareholder consents to act on the provisional committee, it will not render him liable, as a contributory, to the expense of the company.[9]

But in general the form of the deeds of association is such, that if one takes shares without reservation he is to be regarded, as a contributory to the expense,[10] and especially where he acts as one of the provisional committee, and also accepts shares allotted to him.[10]

But one who has obtained shares in a projected railway company, but without executing the deed of settlement, or any deed referring to it, was held not liable to contribute to the expense incurred, in attempting to put the company in operation,[11] and especially if the acceptance of the shares is conditional, upon the full amount of the capital of the company being subscribed, which was never done.[11]

*SECTION IV.

CONTRACTS OF THE PROMOTERS ADOPTED BY THE COMPANY.

§ 5. The company when fully incorporated may assume the liabilities of the preliminary association, incurred in obtaining

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8 Maudslay *ex parte*, 1 Eng. L. & Eq. R. 61.

9 Carmichael *ex parte*, 1 Eng. L. & Eq. R. 66; Clark *ex parte*, id. 69.

10 Burton *ex parte*, 13 Eng. L. & Eq. R. 435; Markwell *ex parte*, 13 Eng. L. & Eq. R. 456; Upfill's case, 1 Eng. L. & Eq. R. 13; Watts *v.* Salter, 12 Eng. L. & Eq. R. 482. See also St. James's Club *in re*, 13 Eng. L. & Eq. R. 589, as to the effect of proof, of the subscriber being present when a resolution is passed.

11 The Galvanized Iron Co. *v.* Westoby, 14 Eng. L. & Eq. R. 386.

It was formally considered, that all persons engaged in obtaining a bill in parliament for building a railway, were partners in the undertaking, and for that reason a subscriber, who acted as their surveyor, could not maintain an action for work and labor, done by him in that character, against all, or any one of the subscribers. Holmes *v.* Higgins, 1 B. & C. 74. See also Goddard *v.* Hodges, 1 C. & M. 33.

But it is now regarded, as well settled, in all the courts in Westminster Hall, that there subsists between the subscribers to such an enterprise, no relation of general partnership whatever, and no power to bind each other, for expenses incurred in carrying forward the enterprise. Each binds himself only, by his own acts and declarations, unless he acts by virtue of some authority conferred by the deeds of association. *Parke*, Baron, in Bright *v.* Hutton, 3 H. L. Cases, 368.

the special act, or as is sometimes the case, where the association make an assignment of their property.[1] But even an express provision in the charter, that the company shall be solely liable for the debts of the association will not exonerate the association unless by the consent of the creditors.[2] But when the company assume the debts of the association, by the assent of their creditors, they will be relieved.[3]

And an agreement, aside of the deed of association, that one of the promoters shall indemnify another, is held valid. Connop *v.* Levy, 5 Railway C. 124; s. c. 11 Q. B. 769. But a general indemnity against costs will only extend to costs in suits lawfully brought. Lewis *v.* Smith, 2 Shelford, Bennett's ed. 1030.

And in regard to liability, for expenses incurred, in carrying forward railway projects, it often happens, that one who has been active may thereby make himself liable to tradesmen, and others, who have performed service, in behalf of the enterprise, upon the expectation he would see them paid. In Lake *v.* Duke of Argyll, 6 Q. B. 479, *Denman*, Ch. J., said: "But where persons meet to prepare the measures necessary for calling the society into existence, attendance on such meeting, and concurrence in such measures, may be strong evidence, that any individual there present, and taking part in the proceedings, held himself out, as a paymaster, to all who executed their orders; and though not liable, as a member, or shareholder, yet his declared intention to become the president, or a member, in whatever event, or to take a share, under any condition, may be material evidence to show that he authorized contracts, with those whose services were required by what may be called the constitutional body."

But a charge to the jury, that before surveyors, in such case, could recover of the provisional committee, they must be satisfied, that defendants did, by themselves, or their agent, employ the plaintiff to do the work, or that, being informed of their having done it, on their credit, by the employment of some one, not authorized, they consented to be held liable, was affirmed in the Exchequer Chamber. Nevins *v.* Henderson, 5 Railway C. 684; Williams *v.* Piggott, 5 Railway C. 544. See also Spottiswoode's case, 39 Eng. L. & Eq. R. 520.

[1] Haslett's Ex'rs *v.* Wotherspoon, 1 Strob. Eq. R. 209; Salem Mill Dam Co. *v.* Ropes, 6 Pick. 23.

[2] Witmer *v.* Schlatter, 2 Rawle, R. 359.

[3] Whitwell *v.* Warner, 20 Vt. R. 425. But by the English statutes companies provisionally registered, are not allowed to make any contract, not indispensable to carrying forward the project to full registration. And where the directors of such a company contracted for plans, sections, and books of reference, to the value of £3,000, it was held a violation of the statute and illegal, and that no recovery could be had upon it. Bull *v.* Chapman, 20 Eng. L. & Eq. R. 488; 7 & 8 Vict. ch. 110.

SECTION V.

HOW CONTRACTS OF THE PROMOTERS MAY BE ADOPTED BY THE COMPANY.

§ 6. Wherever a third party enters into a contract with the promoters of a railway, which is intended to enure to the benefit of the company, and they take the benefit of the contract, they will be bound to perform it, upon the familiar principle that one, *who adopts the benefit of an act, which another volunteers to perform in his name, and on his behalf; is bound to take the burden with the benefit.[1]

SECTION VI.

CONTRACTS BETWEEN THE PROMOTERS AND OPPOSERS OF A BILL, FOR THE CHARTER OF A RAILWAY.

§ 7. The cases in the English books, upon the subject of contracts, between the promoters of railway projects in parliament and those, who have counter interests, and who are ready to persist in opposition to such projects, unless they can secure some compromise with the promoters, are considerably numerous, and involve a question of no inconsiderable importance. We shall, therefore, examine them somewhat in detail.

One of the earliest cases, upon this subject,[1] was decided by the Lord Chancellor, *Cottenham*, upon full argument, and great consideration, as early as 1836. But as this case professes to rest mainly, upon a leading opinion of Lord Chancellor *Eldon*,[2] upon a somewhat analogous subject, it may not be improper here to give the substance of that decision.

The application to parliament, for the plaintiff's company, if granted, it was conceded, would injuriously affect the tolls upon another bridge not far distant. The proprietors of this bridge

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1 Gooday *v.* The Colchester & Stour Valley Railway, 15 Eng. L. & Eq. R. 596; Preston *v.* Liverpool & M. Railway, 7 Eng. L. & Eq. R. 124; Edwards *v.* Grand Junction Railway, 1 Mylne & Cr. 650. The cases in support of this general proposition are very numerous, and will be more fully examined in the next section.

1 Edwards *v.* The Grand Junction Railway, 1 Mylne & Cr. 650.

2 Vauxhall Bridge Co. *v.* The Earl of Spencer, Jacob, 64, (1821.)

were opposing the plaintiff's grant, before the parliamentary committee, with a view to secure some indemnity against such loss, to be specially provided for by the plaintiff's act, upon condition, that the plaintiffs should open their bridge, for the public travel. The promoters of the plaintiff's grant, and the proprietors of the rival bridge, had come to an agreement, in regard to the extent of the indemnity, and upon naming it to the committee, with a view to have it inserted in the act, one member of the committee objected to such course, as calculated to sanction improper influences upon public *legislation. The promoters of the new bridge then proposed to the proprietors of the rival one, to give them security for the proposed indemnity, by way of bond with surety which should quiet their opposition, and the bill pass. This was acceded to and the securities given, and the bill passed accordingly. The opinion of Lord *Eldon* is an affirmance of the decision of the vice-chancellor, retaining the bill till the matter should be tried at law.[2] But the intimations of the chancellor indicate certainly, that he regarded the contract as perfectly valid, and the bill was afterwards dismissed, by consent. Lord *Eldon* said, "in the view I take of the case, it will not be an obstacle to the plaintiffs, that they do not come with clean hands, for it is settled, that if a transaction be objectionable, on grounds of public policy, the parties to it may be relieved; the relief not being given for their sake, but for the sake of the public. Thus it is in the case of marriage brocage bonds. The principle was much discussed in the case of Neville *v.* Wilkinson,[3] where Mr. Neville being about to marry, inquiry was made by the lady's father to what extent he was indebted. Wilkinson, who was applied to at the desire of Neville, concealed a demand which he had against him; after the marriage he attempted to recover it, and a bill was filed to restrain him. I remember arguing it, with obstinacy, but Lord Thurlow thought, that having made a misrepresentation, a court of equity must hold him to it, and that, although the plaintiff was a *particeps criminis;* so it was held in the case of Shirley *v.* Ferrers,[4] in the Exchequer.

"It is argued that this was a fraud upon the legislature, but I think it would be going a great way to say so, for *non constat*, if

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[2] s. c. 2 Mad. 356.

[3] 1 Br. C. C. 543.

[4] Cited 11 Vesey, 536.

it had been pushed to the extent of taking the opinion of the house, that it might not have passed the bill in its former shape. It cannot be said that the agreement is contrary to legislative policy, because one member of the committee makes an objection which is not sanctioned or known by the house at large. Indeed, such things are constantly done, and with the knowledge of the house; for they are in the habit of saying, with respect to these private acts, that though they will not of themselves pass them into laws, yet they will if the parties can agree; and matters sometimes are permitted to stand over to give an opportunity of coming to a settlement.

"It is then said, that the money was to be paid out of the funds * of the Vauxhall Bridge company, which by the act were devoted to other purposes. The proprietors of Battersea Bridge, however, say that they have nothing to do with the funds of the company; that they have contracted with a number of independent persons, to whom they look for the payment of the bonds; and if the obligors agree with the company to pay the bonds with their money, what have the obligees to do with that, unless by antecedent contract? They had no demand in law or equity against the company. If, then, the Vauxhall proprietors choose to sanction what the legislature has not directed, namely, the indemnifying the persons who have become obligors in the bonds, that is one thing; if they have not, then the individual officers who have paid the money over in discharge of the bonds, ought not to have paid it, and may now be called on to pay it back; as between them and the company, the money must be considered as being still in their hands. If the transaction is to be considered merely as between the obligors and the obligees, the latter not refusing the money from whatever hands it came, but not entangling themselves in any contracts between the obligors and the company, then the obligees would not be affected by those contracts. But if so, still the case depends upon the validity of the bonds; for I think the Vauxhall Bridge company may, with propriety, say, if the money was paid in consequence of an arrangement for the discharge of the bonds, and if the bonds were bad, that then it may be called back. When the cause was heard by the vice-chancellor, he did that which he was not bound to do; for he certainly had jurisdiction, and might have decided upon the validity of the bonds. But he directed that to

be tried at law, where all the objections may be raised upon the pleadings in the same manner as here; and considering that in matters of this nature, both courts of law and equity have jurisdiction exercised upon the same principles, I do not see any occasion to vary the decree."

SECTION VII.

CONTRACTS OF THE PROMOTERS ENFORCED IN EQUITY.

§ 8. Edwards *v.* The Grand Junction Railway,[1] is an application to a court of equity to enforce such a contract against a railway * company, whose charter was obtained, by means of the quieting opposition in parliament, in conformity to the contract. The trustees of a turnpike road were opposing in parliament the grant to the defendants, unless their rights were guarantied in such grant. The promoters of defendants' charter, and the trustees of the turnpike road, came to an agreement, in regard to the proper indemnity to be inserted in the act, but to save delay, it was secured by way of contract, on the part of the promoters, providing for a renewal of the covenants, on the part of the company, in a brief time specified, after it should go into operation. The controversy in the present case was with reference to the width of a bridge, by which the railway proposed to convey the turnpike road over their track. The contract stipulated that such viaducts should be of the same width, as the road at that point, which was fifty feet. The charter only required them to be of the width of fifteen feet, and the company having declined to assume the contract of the promoters, were proceeding to build the bridges thirty feet wide only. The bill prayed an injunction, which was granted by the vice-chancellor, and confirmed by the chancellor, who held that an agreement to withdraw or withhold opposition to a bill in parliament, is not illegal; and a court of equity will enforce a contract founded upon such a consideration; and that an incorporated company will be bound by the agreement of its individual members, acting, before incorporation, on its behalf, if the company had received the full benefit of the consideration, for which the agreement stipulated, in its behalf. The opinion of the Lord Chancellor will best show the grounds of

[1] 1 My. & Cr. 650.

the decision. "But then the railway company contend, that they, being now a corporation, are not bound by any thing which may have passed, or by any contract which may have been entered into by the projectors of the company before their actual incorporation.

"If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of the many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon this contract, and that Moss entered into a contract, in his own name, to get the company, when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway; it is, therefore, the agreement of the parties who were seeking an act of incorporation, that, when incorporated, certain things should *be done by them. But the question is, not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still, it is clear that the company have succeeded to, and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and resigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here as the company stand in the place of the projectors, they cannot repudiate any arrangements into which such projectors had entered. They cannot exercise the powers given by parliament, to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld. The case of The East London Water Works Company *v.* Bailey, 4 Bing. 283, was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorized by a

power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the company to meddle with the road at all? The powers under the act give them the right; but before that right was so conferred, it had been agreed that the right should only be used in a particular manner. Can the company exercise the right without regard to such an agreement? I am clearly of opinion that they cannot; and having before expressed my opinion that the contract is sufficiently proved, it follows that the injunction granted by the vice-chancellor is in my opinion proper, and that this motion to dissolve it must be refused with costs."

"The case of The Vauxhall Bridge Company *v.* Earl Spencer, 2 Mad. 356, Jac. 64, (4 Cond. Cha. Rep. 28,) was cited for the trustees; and it certainly is a strong authority in favor of their claim; Lord *Eldon* having in that case expressed an opinion, that the withdrawing opposition to a bill in parliament might be a good *consideration for a contract, and having recognized the right of an incorporated company to connect itself with a contract made by the projectors of the company, before the act of incorporation. On the other hand Dance *v.* Girdler, 1 Bos. & Pull. N. R. 34, was cited for the railway company; but that was an attempt to make a surety liable beyond his contract; and Sir *James Mansfield*, in his judgment in that case, relied much upon the want of identity between the society with whom the contract was made and the corporation; and the question there was as to a legal liability, not as to an equitable right. It was contended for the railway company that, to enforce this equity would be unjust towards the shareholders of the company who had no notice of the arrangement. To this two obvious answers may be made; first, that the court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself; and, secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the act; for although the act provides that bridges shall not be less than fifteen feet in width, it does not provide that they shall not be made wider. The company might under this act clearly agree that this or any other bridge should be fifty feet wide."

SECTION VIII.

CONTRACTS OF THE PROMOTERS BINDING UPON THE COMPANY AT LAW.

§ 9. We have next in order of time the important case of Simpson *v.* Lord Howden,[1] before the Master of the Rolls, and the Lord Chancellor on appeal, where it is held, that equity will not interfere to decree the surrender of an illegal contract, where the illegality appears upon the face of the contract, the remedy at law being adequate. We have then the same case, at law, before the Queen's Bench[2] and decided, on full argument, where it is held, that a contract to pay Lord Howden £5,000, in consideration of his withdrawing opposition to a bill for incorporating "The York & North Midland Railway Company," he being a peer in * parliament, and owning estates, in the vicinity of the proposed line, was illegal, being a fraud upon the legislature. This decision was subsequently reversed in the Exchequer Chamber.[3] The case being the leading case upon the subject, at law certainly, may require a more extended statement. The agreement under seal, between the plaintiff and defendant, (the case now standing, Howden *v.* Simpson,) recited that a company had been formed for making a railway; that defendants were proprietors; that a bill had been introduced into parliament, according to which, the line would pass through plaintiff's estates and near his mansion, and that he was a dissentient and

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1 1 Railway Cases, 326, (1837;) 1 Keen, 583; 3 Mylne & Cr. 97.

2 10 Ad. & Ellis, 793.

3 The case was reversed mainly on the ground that the plea did not allege that the parties, at the time of entering into the contract, intended to keep it secret from the legislature. 10 Ad. & Ellis, 793; 1 Railw. C. 347. But the Exchequer Chamber held that the agreement on the face of it was valid, and that the plaintiff was not bound to communicate to the legislature the bargain he had made with the company, and that a member of the legislature could make any terms for the sale of his land, and compensation for injury to his comforts and property, which it is lawful for a private individual to make. The judgment of the Exchequer Chamber was affirmed in the House of Lords, on full argument, before the Chancellor, Lord *Lyndhurst*, Lord *Brougham*, and in the presence of the two chief justices, and ten of the judges. 3 Railw. Cas. 294. But Lord *Campbell* adhered to his former opinion that the contract must have been held illegal, if it had appeared, that it was an element in the contract, that it should be kept secret, and not communicated to parliament.

opposed the passing of the bill; that defendants had proposed that, if he would withdraw his opposition, and assent to the railway, they would endeavor to deviate the proposed line: and plaintiff agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent: and defendants covenanted that in case the then bill should be passed in the then session they would, in six months after it received the royal assent, pay plaintiff £5,000 as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line, exclusive of, and without prejudice to further compensation to plaintiff, in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation, for any damage, as in the agreement after mentioned.

Plaintiff declared in debt, and averred that he withdrew his opposition to the bill, which passed into a law in the then session, that six months had since elapsed, but that defendants had not paid the £5,000.

*Plea, that the railway, at the time of making the agreement, and according to the act, was intended to pass through the lands of divers individuals; that the agreement was made privately and secretly by the parties thereto, without the consent or knowledge of the said individuals, and was concealed from them continually until the act was passed, and was not disclosed to, or known in parliament, and was concealed from the legislature, during the passing of the act; and that plaintiff, at the time of passing the act, and still, was a peer of parliament.

SECTION IX.

WHAT CONTRACTS, BETWEEN THE PROMOTERS OF RAILWAYS AND OTHERS, WILL BE ENFORCED, EITHER IN LAW OR EQUITY, AGAINST THE CONTRACTING PARTIES, OR THE COMPANY.

§ 10. Since the decision of Howden *v.* Simpson, in the Exchequer Chamber, and the House of Lords (1842), the English courts seem to have acquiesced in the principles there established, until a very recent period. The validity of such a contract, is recognized, in regard to the company purchasing the interest of the lessee of lands near the line of the proposed rail-

way.[1] And where the promoters of one railway entered into an agreement with a land-owner on the proposed line, to take his land at a specified price, (20,000*l.*) by which he was induced to withdraw opposition; and the promoters of a rival line, who proposed also to pass through the same land, had petitioned for a charter, and the merits of the two projects were, under the sanction of the committee of the House of Commons, referred to arbitration, and the solicitors of the two bills agreed, that the adopted line should take the engagements entered into with the land-owners, by the rejected line, it was held, that the second company prevailing, were bound, as a condition of entering upon the lands of plaintiff, to fulfil the terms of the agreement with the first company.[2]

And where one railway company were prohibited from opening their line for traffic, until they had built a branch railway, *connecting their line, with that of another company, it was held, that a court of equity was bound to enforce the prohibition, on motion of the other company, though the probable result would be, to cause inconvenience to the public, and not to benefit the other company.[3]

SECTION X.

COURTS OF EQUITY WILL ENFORCE CONTRACTS WITH THE PROMOTERS.

§ 11. The English courts of equity do not hesitate to restrain railways, from proceeding to take land, under their compulsory powers, where the proprietor of the estates had surceased opposition to the bill, by an arrangement with the projectors, by which they stipulated, that the company should pay a certain sum, which it had declined to do. This was done notwithstanding the proprietor was a peer of parliament, and notwithstanding the tender of an undertaking, on the part of the company, not to enter upon the land, until the further order of the court, and not-

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1 Doo *v.* The London and Croydon Railway, 1 Railw. C. 257.

2 Stanley *v.* The Chester and Birkenhead Railway, 1 Railw. C. 58; 9 Simons, 264.

3 Cromford and High P. Railway *v.* Stockport, D. & W. Bridge Railway, 29 Law Times, 245.

withstanding the time, within which the company, by their charter, were authorized to take land would have expired, before the hearing of the cause.[1] And although this case is questioned, by some writers,[2] the learned Lord Chancellor *St. Leonards* said the cases establish the proposition, that a *bonâ fide* contract of this sort, not evading the act of parliament, but enabling the company to assist its views, and carry the act into effect, was valid, without reference to the reasonableness of the amount agreed to be paid.[3]

*SECTION XI.

SUCH CONTRACTS ENFORCED WHERE THE RAILWAY IS ABANDONED.

§ 12. It has sometimes been held, that an absolute agreement made, by the promoters of a railway, to pay one a certain sum

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[1] Lord Petre *v.* Eastern Counties Railway Co. 1 Railw. C. 462.

[2] Shelford, 400.

[3] Hawkes *v.* Eastern Counties Railway Co. 15 Eng. L. & Eq. R. 358; s. c. before the vice-chancellor, 4 Eng. L. & Eq. R. 91, where it is considered that a railway company having agreed to purchase an estate, although moved to do so, for the quieting of opposition to a bill before parliament, to enable them to extend a branch in a certain direction, which was subsequently abandoned, were nevertheless bound to perform their agreement with the owner of the estate. See also Shelford on Railways, 400. The case of Hawkes *v.* The Eastern Counties Railway Co. came before the Lord Chancellor *St. Leonards*, on appeal from the vice-chancellor in 1852, where the whole subject of the legality and binding character of this class of contracts is learnedly discussed, as well as the propriety of decreeing specific performances, and most of the cases elaborately and learnedly reviewed and compared. The conclusion to which that eminent judge arrives is, that even in a case, where the company were not able to carry their project into full effect, but had abandoned it, they were nevertheless bound specifically to perform contracts of this kind, and that it was no objection to decreeing specific performance, that it would involve the necessity of paying the price of the land out of the general funds of the company, which had been raised, for provisional purposes merely, and with no view of ultimately purchasing land and building the road; and that the land could be of no use to the company, under present circumstances. One can scarcely fail to perceive in this case, that a principle, perhaps sound and just under some circumstances, is here pushed quite to its extreme verge. Damages at law might have been the more proper disposition of all interests concerned.

The opinion of the Lord Chancellor is a masterly exposition of the view which he adopts. After disposing of the preliminary questions he proceeds: "In the case of Webb *v.* The Direct London and Portsmouth Railway, 9 Eng. L. & Eq.

to *quiet opposition, is valid, notwithstanding the contemplated work is never carried forward, and the injury to the opposer,

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R. 249, there was originally a decree for specific performance, and after the decision in this case was made—the court having relied on that case—that decision was reversed. Now, it appears to me that that case was reversed upon the uncertainty of the contract; and if it was reversed upon any other ground, I should have required further time before I could accede to the doctrine that a company entering into such a contract as this is, could, upon any grounds of supposed illegality, get rid of the contract. If, as in some of these cases, several of which have been cited, the contract is so worded that it really depends upon this, that the company are not to pay unless they require the land; that is, they are to pay when they take the land, which assumes that they are not to pay unless they do take the land—that may be considered a conditional contract. I have nothing to say to such cases; but where, as in this case, it is an absolute and unqualified contract to take the land, I should certainly hold that no subsequent conduct on the part of the company could relieve them from the obligation they were bound by at the time they entered into it. The act of parliament having passed, this was as good a contract as a man ever entered into. I must look at it at the time when it was executed—at all events, at the time the act passed. It contemplated the act passing, and the act did pass exactly in the terms pointed out in the agreement. Well, then, it is a valid contract. Suppose, as was observed in argument very properly, suppose this agreement had been entered into after the passing of the act, would any man at the bar say that was a contract not to be executed? Looking at the authorities which have concluded that question, why should it not be as binding, being entered into before the act passed, as it must be admitted it would have been if executed immediately after the act passed? There is no magic in these things. The good faith, the truth, and the honesty of the transaction is to be looked at—there is no rule of law in it. If, therefore, Webb *v.* The Direct London and Portsmouth Railway Company is considered to decide any thing adverse to the decision in this case, I should support the decision of this case, as far as my authority went. With great deference to others, I should support this decision certainly at the expense of the contrary view, that is, contrary to the view taken on that appeal, if that were to be so; but I apprehend it turned on the uncertainty of the contract. In Lord James Stuart *v.* The London and Northwestern Railway Company, the Master of the Rolls there decreed a specific performance, upon the authority of Webb *v.* The Direct London and Portsmouth Railway Company, before it was reversed. It was said that the reversal of that therefore displaced his authority. That also was reversed. There again were two questions: first, a question whether there was any concluded agreement—any binding agreement—any thing amounting to a positive contract; and next, there was great delay. Those cases were relied upon, and I can only repeat that I am not saying either of those decisions was not a proper decision, and I am not called upon to say that; but I say, if they are to be considered in opposition to a specific performance in a case like that before me, that I should totally disagree with them. It is a new view of the doctrine of this court, and it is a view which

which the *contract of quietus assumes, is never sustained.[1] But such a contract is certainly based upon a principle of very ques-

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could not be supported consistently with the many authorities which exist on this subject.

"Then it is argued with great force and insisted upon that there is illegality here, because the company is applying its funds to purposes not authorized by the act of parliament. Now, for that several cases were quoted. MacGregor *v.* The Dover and Deal Railway Company, 17 Jur. 21; s. c. 16 Eng. L. & Eq. R. 180; East Anglian Railway Company *v.* Eastern Counties Railway, 21 Law J. Rep. (N. S.) C. P. 23; s. c. 7 Eng. L. & Eq. R. 505; and the case of Bagshawe *v.* The Eastern Union Railway Company, 2 Hall & Tw. 201; s. c. 2 Mac. & Gor. 389. Those were all cases in which the company were really going beyond their powers; and one cannot but lament to see great companies like these, with an attorney always at their command, with every means of consulting counsel daily if they think proper, and which they resort to sufficiently, and with enormous capital, entering into a contract, with a full knowledge of all their powers, and with legal advice constantly at command, turning round upon the party with whom they have contracted, and endeavoring to evade the contract upon the ground that the contract they entered into is beyond their powers and absolutely illegal on the face of it. One cannot but regret that these companies should resort to so unseemly a defence in courts of justice. I do trust we shall not hear of many more of these cases, but that these companies will take care that in entering into contracts with individuals who are not so well protected, they do not go beyond their powers, and one cannot but feel that they do not enter into a contract of this sort if it be illegal, without being perfectly aware of its illegality. Nothing can be more indecent than for a great company to come into a court of justice, and to say that a contract—a solemn contract which they have entered into—is void on the ground of its not being within their powers, not from any subsequent accident, not from any mistake or misapprehension, but because they thought fit to enter into it and meant to have the benefit of it, if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous and they should desire to get rid of it. Such highly dishonorable conduct I trust we shall not often see in courts of justice.

"Now, these cases last referred to it is not proper for me to find fault with. They are cases in which it appears that the company did enter into engagements clearly beyond their powers, and the parties contracting with them must be supposed to have known that. It has been decided that they cannot be enforced, and I have nothing to say against those decisions; but this case does not fall within those decisions. There is nothing that has been stated to me of any sort or kind excepting this: That a Mr. Duncan, in part of his evidence, refers to the intention of the parties to form a junction with the Ambergate line, and in that way going right through the plaintiff's property, they being unable otherwise to get at the point which they proposed to get at by the curvilinear diverging line, which parliament rejected. Then they say, it is a fraud on the act of

1 Bland *v.* Crowley, 6 Railw. C. 756; 6 Exch. 522.

tionable policy, *and courts would more incline to give the contract, when consistent with the words used, such a construction,

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parliament. There is no such thing in the contract—no such thing in the answer. This court has not permitted any evidence to be given on a point of defence that was not raised in the answer; because if it had been raised, Mr. Hawkes could have shown there was no foundation for it. I believe there is no foundation. I believe that the company had in view that they might, by this short cut through Mr. Hawkes's property, get to a certain point; but Mr. Hawkes had nothing to do with that. The act provided for taking this property for the very purpose authorized by the act of parliament itself. The cases, therefore, do not touch this question at all, and, consequently, I am not embarrassed by their authority.

"Then it is said, there is no mutuality; and, therefore, that the company could not enforce it, because they have no means of carrying the railway on; and that involves also the question of the expiration of the time. I have already referred to authority to show that expiration of time in a case of this sort amounts to nothing, where, as in this case, it is the fault of the company itself that the time has been allowed to expire. They have thought proper to allow the time to expire. Their conduct, upon this correspondence, admits of no excuse. With full knowledge of all they intended to do, they are told the deeds are ready to be examined with the abstracts; they make an appointment to go down, without raising a word of complaint, to examine the abstracts with the deeds. They break that appointment. They make no other appointment. They are told that the vendor has vacated the possession of the property, and that it is at their disposal, and that he has sought another residence, as he must necessarily have done, and then they serve a formal notice, telling him they will have nothing to do with the contract; that they do not want the property, and do not mean to make the line. What has mutuality to do with it? There are many cases where the court has not looked to the doctrine of mutuality as it ought to have done, and has inferred a contract against a party where that party could not have sufficiently enforced a contract against any one else. Those are cases of great hardship; but here I must look at this contract at the time the act of parliament was passed, and at the time it was entered into. Where then is there any want of mutuality? Could not the company, within an hour after the act passed, have enforced the contract against Mr. Hawkes? Nobody disputes or doubts it. Where there is the want of mutuality, it is not because a man, subsequently to the contract, chooses to introduce impediments to the performance of the contract on his own part, but it is where it is impossible to do that which he had contracted for; and he cannot, therefore, turn round against the man with whom he has contracted; and throw upon that man the loss. Who is to bear the loss in this case? The company say the loss is to fall upon Mr. Hawkes. Who is to blame? The company; not Mr. Hawkes. The company, therefore, modestly desire, in consequence of their own act, in breaking this agreement as they have done, and rejecting the line after they had obtained authority to make it, throwing up the line and endeavoring to repudiate their solemn contract, that the whole loss and burden is to be thrown on the party who is not to blame. Fortunately the law,

that it shall be the *purchase of a pecuniary interest, or indemnification for a pecuniary loss, which are legitimate subjects of

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justice, and equity of the case are agreed. There is nothing to prevent my enforcing the contract in the case.

"Then certain other cases were cited, as showing I ought not to interfere to enforce performance of the contract. Gage *v.* The New Market Railway Company, 21 Law J. Rep. (N. S.) Q. B. 398; S. C. 14 Eng. L. & Eq. R. 57, was one. That seems also to turn on the conditional agreement. There was an agreement there, that the company, before they entered on the land which they might require, should pay, and it was considered there was no absolute agreement to pay. No doubt, the Lord Chief Justice said, if there had been a covenant to pay, or a covenant to pay a sum as a sum in gross, that the court would have treated it as void. The case was not before the court; but they evidently considered it within the other cases, where they had held that the company could not bind itself beyond its powers. It required great consideration how far that doctrine should be carried. I dare say it will be necessary that it should be ultimately carried elsewhere before it can be finally decided. It is a great and serious question how far these companies can be allowed to enter into contracts solemnly under their seal, and then turn round upon the parties and say they have exceeded their powers, and, consequently will not perform their contract. Then in the other case of Gooday *v.* The Colchester and Stour Valley Railway Company, 19 Law Times, 334; S. C. 15 Eng. L. & Eq. R. 596, there was no agreement binding upon the company.

"I can find no authority upon the subject, (and I have looked carefully through every thing which has been cited, and I postponed disposing of the case in order that I might have that opportunity,) to shake the opinion I entertained when the agreement was closed, that this is a very clear case for specific performance. I am very glad that the law turns out to be consistent with the equity of the case; and, therefore, I dismiss this appeal, and with costs."

This case was affirmed in the House of Lords, 35 Eng. L. & Eq. R. 8, and elaborate opinions delivered, by the Lord Chancellor, *Cranworth*, Lord *Campbell*, and Lord *St. Leonards*. The case is obviously put somewhat upon the ground of the peculiar state of facts involved. 1. It is a contract under the seal of an existing company, and not the contract of the projectors of a contemplated company merely. 2. Although the contract had respect to an extension of the existing line, by means of a branch line, which, as to the existing shareholders, the company had no right to construct, and even with the consent of the legislature, could not construct, with funds of the existing company, yet nothing of this seems to have been known to Mr. Hawkes. He does not seem to have been made aware of any purpose of the company to do any act beyond their powers, or in conflict with the rights of the shareholders.

These several points are thus stated in the notes of the case:—

Where an act creating a railway company, or giving new powers to an existing company, authorizes the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes; if he does not know of any intention to misapply the

bargain and sale, than to *regard it, as the purchase of good-will, or the price of converting ill-will unto favor, which are

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funds of the company, but acts *bonâ fide* in the matter, he may enforce performance of the contract.

Semble, That where the directors of a railway company, wanting part of a property, purchase more of it than is required, though that may become a question between them and the shareholders, they cannot on that account avoid the contract with the seller.

Promoters of a company to make a line of railway, or persons standing in a similar situation, as directors of an existing company applying to parliament for authority to make a new line, may lawfully enter into a contract for land that will be necessary for the purposed line should the bill pass, and when it has passed, such contract will be valid, and may be enforced. The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards. *Secus*, where the act itself is illegal, and parliament is to be asked to legalize it.

Where a contract for the purchase of land is made by the projectors of a proposed line of railway, though an action at law may be maintained upon the contract, a court of equity will not, simply on that account, refuse its interference to compel specific performance.

Under the first head the following suggestions of Lord Chancellor *Cranworth* are of interest: "A railway company cannot devote any part of its funds to an object not within the scope of its original constitution, how beneficial soever that object might seem likely to prove.

"Thus in Colman *v.* The Eastern Counties Railway Company, 10 Beav. 1; 4 Railw. C. 513; Lord *Langdale*, at the instance of a shareholder, restrained the company and its directors from applying any part of their funds in assisting a company which had been formed for establishing a steam communication between Harwich and the northern ports of Europe. The directors of the railway company thought that such an application of a part of their funds would be likely materially to promote the interests of their shareholders by encouraging and increasing the traffic on their line. But Lord *Langdale*, though admitting that such an expenditure might very likely conduce to the interest of the railway company, yet restrained the directors by injunction from so applying any part of their funds, on the ground that they had no right to expend the money of the company on any project not directly within the terms of its incorporation.

"In Salomons *v.* Laing, 12 Beav. 339, the same learned judge restrained the directors of the South Coast Railway Company from applying any part of the funds of that company in the purchase of shares of another company, (the Portsmouth,) by which purchase the defendants hoped to benefit the company of which they were directors. The court held that the defendants had no right to deal with the funds in a manner not authorized by their act.

"The same principle was recognized and acted upon by Sir James *Wigram* and Lord *Cottenham* in Bagshawe *v.* The Eastern Union Railway Company, 6 Railw. C. 152. There the legislature had authorized the defendants to raise, by way of additional share capital two sums of 200,000*l.* and 100,000*l.* the former for the

certainly not regarded ordinarily, as the just basis of contracts.[2]

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purpose of enabling them to construct a branch line to Harwich, and the latter for enabling them to purchase and complete a cross line to Hadleigh. The plaintiff had purchased scrip certificates for shares in these undertakiogs, or one of them, on which all calls had been paid, and he stated by his bill, that the directors, though the whole of the two sums, 200,000*l.* and 100,000*l.* had been raised, yet had abandoned the intention of constructing the Harwich line, and were about to apply the sums so raised to the completing of their line from Ipswich to Norwich. The bill prayed, amongst other things, a general account of all sums so applied, that the directors might be decreed personally to make them good, and for an injunction to restrain any further similar application of any part of the said two sums of 200,000*l.* and 100,000*l.* To this bill there was a general demurrer, but it was overruled, first by Sir James *Wigram*, and afterwards, on appeal, by Lord *Cottenham;* the ground of the decision there, as in the other cases, being that the directors had no right to expend any part of the sums raised for a special purpose upon any other object than that for which they were so raised.

"In all these cases, the discussion was raised by shareholders calling in question the misapplication or intended misapplication of the corporate funds by the directors. But the doctrine has been acted on in the courts of common law to the extent of holding that a contract, even under the seal of a company, cannot in general be enforced, if its object is to cause the corporate property to be diverted to purposes not within the scope of the act of incorporation. Thus, in the case of The East Anglian Railway Company *v.* The Eastern Counties Railway Company, 11 C. B. 803; s. c. 7 Eng. L. & Eq. R. 505, the Court of Common Pleas, after an elaborate argument, held that no action could be maintained against the defendants on a covenant into which they had entered for payment to the plaintiffs of the costs incurred in applications to parliament made at the instance of the defendants for obtaining from the legislature powers which the defendants considered it desirable for their interests that the plaintiffs should possess. The Chief Justice, in delivering the judgment of the court, says, (11 C. B. 809; s. c. 7 Eng. L. & Eq. R. 510,) 'The statute incorporating the defendants' company, gives no authority respecting the bills in parliament promoted by the plaintiffs, and we are, therefore bound to say, that any contract relating to such bills is not justified by the act of parliament, is not within the scope of the authority of the company as a corporation, and is therefore void.'

"This case was afterwards recognized and acted on by the Exchequer Chamber, in the case of MacGregor *v.* The Official Manager of the Deal & Dover Railway Company, 18 Q. B. R. 618; s. c. 16 Eng. L. & Eq. R. 180. It must,

[2] Gage *v.* Newmarket Railway Co. 7 Railw. C. 168; s. c. 14 Eng. L. & Eq. R. 57; Porcher *v.* Gardner, 14 Jur. 43; 19 L. J. 63; 8 C. B. 461; Shelford on Railways, 402. See also Cumberland Valley Railway Co. *v.* Baab, 9 Watts, 458; Hawkes *v.* Eastern Counties Railway Co. 7 Railw. Cases, 219; s. c. 4 Eng. L. & Eq. R. 91.

*But in many cases these provisional contracts have been enforced, notwithstanding the projected works have been aban-

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therefore, be now considered as a well-settled doctrine, that a company incorporated by act of parliament for a special purpose, cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be.

"I have referred to these cases, and there are others to the same effect, for the purpose of showing how firmly the law on this subject is established, and of guarding myself against being supposed to throw any doubt upon it. But I do not think that the present case comes within the principle on which these decisions have rested. The making of the Wisbeach & Spalding Branch was not treated by the legislature as a new and independent object to be carried into execution by distinct funds raised for that special purpose. The power to make the new line was, according to the construction I put on the act, merely an addition to the powers conferred by the former acts. So that after the Wisbeach & Spalding act came into operation, the rights and powers of the company were to be regarded as if they had originally been powers, to make the new line, and to raise the additional capital. The new works were to be considered as having formed part of the original undertaking, and the new shares were to be considered as part of the general capital. From the time, therefore, when the Wisbeach & Spalding bill received the royal assent, (and until that happened there was no binding contract,) the directors had just the same right to apply their funds to the purchase of land for the purposes of the new line, as, before the passing of that act, they had for the purchasing of land for the original line. This consideration, therefore, seems to me clearly to distinguish the present case from all those cases cited in the argument. The contract here was to apply the funds of the company to a purchase within the scope of its incorporation, and not to any purposes foreign to it, and I see no objection, therefore, to the contract on this first ground.

"But it was argued, secondly, that even supposing the contract not to be open to objection on the ground of its being an attempt to appropriate the company's funds to an object foreign to their original purposes, still, that it could not be supported, inasmuch as it was an agreement to purchase for the new railway lands not wanted for the purpose of making it. The directors had originally desired to obtain powers to make a straight cut from their new line to join the Ambergate, Nottingham & Boston Railway, and for that purpose it would have been essential to them to possess the plaintiff's land, but they failed in their object of obtaining power to form this straight cut, and then there was not, it was said, any necessity for them to get possession of the plaintiff's land. A small portion only of it, about an acre and a half, is within the line of deviation, and it was argued that a contract to purchase the whole, (nearly six acres,) was a contract *ultra vires*, inasmuch as the company could only purchase what was really necessary or proper for the construction of the line. But the answer to this argument appeared to me satisfactory. The contract was not necessarily, and on the face of it, *ultra vires*. If the land in question was really wanted by the appellants for what are called extraordinary purposes, they were authorized to

doned.[3] *But where the contract is a mere arrangement to purchase land at a specified price, for the purpose of building

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purchase it. Besides the line of deviation actually cuts the respondent's house in two, and in such circumstances the appellants had no right to take a part without taking the whole, if the plaintiff required them to do so; and it is a reasonable inference that the contract to purchase the whole was made because, wanting what was within the limits of deviation, the directors knew that they could not stop short with what was within those limits. *Be that, however, as it may, there was nothing to show the respondent that his land was not wanted for the legitimate objects of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid as being beyond their powers;* for as argued at the bar, it could be no answer to an action for iron rails bargained and sold, that the contract had been entered into, not in order to obtain rails for the use of the line, but in order to keep them in hand for the purpose of a future use, on a speculation that iron was likely to rise in value. I consider, therefore, that this second objection is as untenable as the first."

In regard to the second point adverted to in the notes of this case, Lord *Campbell* made some comments which seem to us of very considerable weight as applicable to the general subject involved: "During the argument there was much discussion on the question how far such a company is bound by contracts entered into by the promoters of the act of parliament by which the company is constituted. That question really does not properly arise here; but I think it right to guard myself against the peril of being supposed to acquiesce in the doctrine contended for by the respondent's counsel, that there is complete identity between the promoters of the act and the company, and that as soon as the act has received the royal assent, a bill in equity might be filed against the company for specific performance of any contracts respecting land into which the promoters had entered. If the company should adopt the contract and have the full benefit of it, I think the company would be bound by it in equity, and therefore I approve of the decision in Edwards *v.* Grand Junction Canal Company, 1 Myl. & Cr. 650; 1 Railw. C. 173; although the language of Lord *Cottenham* in that case may require qualification and must be taken with reference to the facts with which he was dealing. *But it seems to me that the extension contended for of the principle on which that case, and several similar cases which have followed it, rest, is quite unreasonable, and would lead to very mischievous consequences.

"Here then is a contract admitted to be under the common seal of the company. The appellants make an idle allegation that the seal was affixed without the sanction of a majority of the members of the company, but no fraud is imputed to Mr. Hawkes. The directors have repeatedly recognized the validity of the contract, and in an action at law upon it, under a plea of *non est factum*, they

3 Shrewsbury and Birmingham Railway Co. *v.* London and Northwestern Railway Co. 20 L. J. Ch. 90; s. c. 14 Jur. 921; 1 Eng. L. & Eq. R. 122; Hawkes *v.* Eastern Counties Railway Co. 20 L. J. 243; s. c. 4 Eng. L. & Eq. R. 91; Preston *v.* Liverpool, Manchester & Newcastle-upon-Tyne Junction Railway Co. 1 Simons, (N. S.) 586; 7 Railway C. 1; 7 Eng. L. & Eq. R. 124.

the railway, and the *quieting of opposition does not enter into the consideration, the company are not bound to pay over the

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could have had no defence, though, if they could allege and prove that Mr Hawkes was guilty of illegality in entering into it, the action would be barred.

"But dismissing the charge that he was bargaining for the application of the funds of the company to a line to be made without the authority of parliament, the contract is merely the ordinary contract between a company meaning to apply to parliament for authority to extend a line of railway, and the owners of the land through which the extended line is meant to pass, to be carried into effect if the solicited act of parliament be obtained. The shareholders of the company might if they pleased object to their funds being applied to defraying the expense of soliciting the bill, but if they remain quiet it may fairly be inferred that they all approve of the extension; and when the bill to authorize the extension has received the royal assent, no shareholder can any longer complain. According to the manner in which such bills are usually framed, the extended line becomes part of the concern to be managed by the company for the profit of the body of shareholders, power being given to the company to increase the capital, or by some means to provide the money necessary to complete the extended line. Since the case of Simpson *v.* Lord Howden, 9 Cl. & Fin. 61, it is impossible to contend that an agreement by a land-owner to withdraw opposition to a bill for a railway intended to pass through his property is not a good and valuable consideration. I adhere to the doctrine laid down in a passage quoted from my judgment in the case of the Mayor of Norwich *v.* The Norfolk Railway Company, 4 Ell. & Bl. 397; s. c. 30 Eng. L. & Eq. R. 120; but that referred to doing something which was positively criminal and indictable, the obstruction of a navigable river by building a bridge across it. This cannot lawfully be done in the hope that an act of parliament may be obtained to legalize it. But where no offence is to be committed against the public, and there is a mere want of authority for a transaction among private individuals or commercial companies, which authority can only be obtained by act of parliament, no objection whatever can be successfully made to the parties entering into an agreement for completing the transaction when the necessary authority is so obtained."

In regard to decreeing specific performance of contracts of this character, the Lord Chancellor makes some pertinent remarks: "The third point made in support of this appeal was, that even taking the contract to have been a good and valid contract, into which the company might lawfully enter, still, the case was one in which a court of equity ought not to interfere, but ought to leave the plaintiff to assert his legal rights by action. It was argued that the court has frequently acted on this principle in suits where a vendor has been seeking, as in this case, to enforce against a railway company the specific performance of a contract for the purchase of land, when the time within which the line was to be made had expired. And reference was in particular made to two cases decided by Lord Justice *Knight Bruce* and myself, when I held the office of lord justice. I allude to the cases of Webb *v.* The Direct London and Portsmouth Railway Company, 1 De G. Mac. & G. 521; s. c. 9 Eng. L. & Eq. R. 249, and Stuart *v.* The

money, unless they enter *upon some portion of the land, and under such circumstances an absolute covenant to pay the money, by the company, would be *ultra vires* and void.[4]

London and Northwestern Railway Company, 1 De G. Mac. & G. 721; s. c. 11 Eng. L. & Eq. R. 112.

"In the former of these cases (the particulars of which his lordship fully stated) the court proceeded on two grounds. In the first place, the terms in which the deed was framed were such as to lead the court strongly to the conclusion that the whole contract was meant to be conditional on the line being formed, and that if it should be (as in fact it was) abandoned by its projectors, then all the provisions of the agreement were to fall to the ground; a construction, I may observe, which receives great support from the subsequent case of Gage *v.* The Newmarket Railway Company, 18 Q. B. Rep. 457; s. c. 14 Eng. L. & Eq. R. 57. But independently of that difficulty the case appeared to be one in which a court of equity ought not to interfere in favor of the plaintiff, for that, by any such interference, we should be doing injustice in the attempt to add to the legal remedy. The injury which the plaintiff sustained by the non-performance of the contract was this; though he was left with the whole of his land untouched, he lost all claim to the £4,500 and might, perhaps, have sustained damage consequent on his having been for five years liable to have any portion of it, not exceeding eight acres, taken by the company for the purpose of the railway. *That was evidently a case for compensation by action for damages, and not for relief by way of specific performance.* Indeed, I hardly know how a decree for specific performance could have been there enforced, for no particular eight acres had been contracted for, and the company had no power to select eight acres, except for the purpose of making the railway, the power to make which had long since ceased. On these grounds the court refused to interfere, leaving the plaintiff to the legal remedy on his covenant."

"I have thought it necessary to explain the grounds on which the decision in these two cases rested, for the purpose of showing that they are not at variance with the decision now under appeal. Here there is no uncertainty as to the subject-matter of the purchase. The vendor did not sleep on his rights, and wait until it was impossible for the purchaser to make the line. On the contrary, from the very day on which the contract was to be completed, he insisted on its performance, having shortly before that time quitted possession of the property, and within less than five months afterwards he filed his bill. It is true that the directors, after the filing of the bill, allowed the time to pass, within which they were bound to complete the line. But the plaintiff is not to blame for that. He did not, either actively or passively, mislead the defendants, and it would be impossible to hold that he is not entitled to the relief he asks, without going to the length of saying that no vendor of an estate, contracting to sell to a railway company, can ever have a decree for a specific performance if the company should see fit afterwards to abandon the undertaking, with a view to which the contract was made."

4 Gage *v.* The Newmarket Railway, 14 Eng. L. & Eq. R. 57. In this case, the views of Lord *Campbell*, in delivering the opinion of the court, do not seem to

*SECTION XII.

PRACTICE OF COURTS OF EQUITY IN DECREEING SPECIFIC PERFORMANCE.

§ 13. The English courts of chancery have, in many instances, enforced specific performance of contracts, between different lines

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be altogether reconcilable with those expressed by the Lord Chancellor, in Hawkes *v.* The Eastern Counties Railway, but as they seem to us more consistent with the views maintained in this country, upon analogous subjects, and those which we anticipate, may probably find more favor, in the English courts, when the outward pressure of circumstances, shall by lapse of time be removed, we here adopt them. Lord *Campbell*, Ch. J.: "We are of opinion, that the defendants are entitled to our judgment. Taking the deed as set out on oyer, we think that there is no breach well assigned upon it. The covenant there (without saying any thing as the declaration does about 'reasonable time') is merely in these words: 'That in the event of the bill hereinbefore mentioned being passed in the present session of parliament, the said company shall, before they shall enter upon any part of the lands of the said Sir Thomas Rokewood Gage, in the said county of Suffolk, pay to the said Sir T. R. Gage, his heirs and assigns, the sum of £4,900 purchase-money, for any portion of his lands not exceeding forty-three acres, which the said company may, under the powers of their act, require and take for the purposes of their undertaking; that in addition to purchase-money, as aforesaid, the said company shall pay to the said Sir T. R. Gage, his heirs and assigns, before they shall enter upon any part of the said land, the sum of £7,100 as a landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them.' The question we have to determine is whether, the company never having entered upon any part of the plaintiff's lands, he is now entitled to sue for these two sums, or either of them? The £4,900 is declared to be the purchase-money for the land to be required and taken; and the only time of payment mentioned is before the company enter on the land. Therefore, if no land is required or taken, and the company never enter on any part of the land, there seems great difficulty in saying that there has been a breach of covenant in not paying the money. So the £7,100 is declared to be a compensation for the severance of the land taken from the rest of the plaintiff's land, and the same time of payment is defined. But there has been no severance to be compensated, and the time for payment has not arrived. The deed does not bargain for a sum of money to be paid absolutely by the company to the plaintiff, as a consideration for his withdrawing his opposition to the bill, but provides a peculiar mode of estimating the value of the land to be taken, and of the compensation to be made for severance-damage, instead of the modes pointed out by the general acts upon this subject. We therefore do not think that the company can be considered as having absolutely covenanted to pay £12,000 to the plaintiff, in a reasonable time after the passing of the act. If this deed could bear such a con-

*of railways, fixing mutual arrangements, in reference to their future operations, even where acts of parliament were necessary to carry such contracts into full effect, and sometimes after a change of circumstances, materially affecting the interest of the parties concerned. And those courts have often enforced an injunction, in cases of this kind, where interests of great magnitude were concerned, even where the right of the plaintiff was questionable, upon the ground, that things were required to be kept in a safe train, until the rights of the respective parties could be definitely determined.[1]

But the practice of the English courts of equity, in regard to this subject, resting chiefly in discretion, as might be expected, is very uncertain, and the cases not easily reconcilable. In many cases, where the right of the plaintiff is doubtful, the injunction to stay the progress of the road, till the contract was performed, has been denied, and the party remitted to pursue his rights in a court of law. [2] The latter course would seem to be most consist-

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struction, we should have thought it so far *ultra vires* and void. Here the railway company are the covenanters; and if the present action lies, the capital paid up by the shareholders must be answerable for the damages to be recovered. We consider that this would be a misappropriation of the funds of the company, which the directors could not lawfully make. All the cases relied upon by the plaintiff's counsel are clearly distinguished from the present, except Webb *v.* The London and Portsmouth Railway Company, before Vice-Chancellor *Turner*. Notwithstanding our high respect for that learned judge, we cannot concur in the reasons for his decision; and although it has not been expressly overturned, its authority was greatly shaken when it came before the Lords Justices of Appeal. We do not feel it necessary to give any opinion upon the case of Bland *v.* Crowley, in which the learned judges of the Court of Exchequer were divided, as the deed there discussed varies materially from the present. Nor would it be proper to give any opinion upon Stuart *v.* The London and Northwestern Railway Company, as we learn that when it came before the Lords Justices of Appeal, it was sent by them to be decided in a court of law. We are happy to think that the question in this case being on the record, it may be brought before a court of error." See § 16, and notes. The same principle was further enforced and illustrated, in a recent case, in the House of Lords. Edinburgh, Perth, and Dundee Railway *v.* Philip, 28 Law Times, 345, 39 Eng. L. & Eq. R. 41.

[1] Great Western Railway Co. *v.* The Birmingham & Oxford Junction Railway Co. and others, 2 Phillips, Ch. Cases, 597. The remarks of *Cottenham*, Lord Chancellor, in this last case, are very pointed, in defence of the practice, in the English courts of equity, of enforcing contracts, made by the projectors of railways, against the company itself, after it comes into operation.

[2] Webb *v.* Direct London & Portsmouth Railway Co. 9 Eng. L. & Eq. R. 249.

ent with *the ordinary proceedings of courts of equity, in applications for specific performance.

When the same case was before the Vice-Chancellor, *Turner*, he seemed to regard the plaintiff as entitled to specific performance, but the Lords Justices, upon appeal, entertained no doubt that the party should be remitted to his rights in a court of law. See Preston *v.* Liverpool, Manchester & Newcastle Junction Railway Co. 1 Simons (N. S.) 586; S. C. 7 Eng. L. & Eq. R. 124. The Court of Appeal, in a similar case, Lord J. Stuart *v.* London & Northwestern Railway Co. 7 Railw. C. 44; 11 Eng. L. & Eq. R. 112, put their refusal to decree specific performance, upon the grounds, that the party, if he had any right, could obtain complete redress at law, and that, after the abandonment of the project, or material departures from it, it would be impossible for the railway to hold the land to any beneficial purpose, after paying the money, and that therefore the principle of mutuality wholly failed. The Lord Chancellor, *St. Leonards*, seemed also to be of opinion, that the only ground, upon which the decision, in Webb *v.* London & Portsmouth Railway Company, 9 Eng. L. & Eq. R. 249, could be vindicated, was the want of mutuality. But it would seem, that this whole class of cases, where contracts have been made to take land, either at a given price per acre, or for a gross sum, or to pay a sum of money, for the damage to an estate, in gross, by reason of a railway coming in a certain line, either across or near the premises of the obligee, should be regarded as conditional, unless the contrary appeared, in express terms, or by the strongest implication. Any other view of these parliamentary contracts, as they are denominated, gives them very much the air of wagering policies, or legislative gambling! See also upon this subject, Potts *v.* The Thames Haven Dock & Rail. Company, 15 Jur. 1004; S. C. 7 Eng. L. & Eq. R. 262, where it is held, that in pursuing a claim for specific performance of an agreement of a railway company to purchase land of trustees, that the persons beneficially interested in the land were not necessary parties to the proceeding. A query is suggested, whether a specific performance could be decreed, there having been no valuation of the land, and in this case there had been great delay on the part of the company, owing to their pecuniary embarrassment, but after considerable discussion, it was agreed to give the company further time, and the claim was ordered to stand over. It has been held, that where a private company leased land, with a clause of reëntry and were subsequently incorporated, with an express provision, in their charter, that all contracts made before the act of incorporation shall be binding upon the corporation, and they have the same rights, as if these contracts were entered into with them, that they might maintain ejectment for the land. London Dock Co. *v.* Knebel, 2 M. & Rob. 66.

The case of Strasburgh Railway Co. *v.* Echternacht, 21 Penn. 220, was this:— Several persons signed a paper agreeing that if the Strasburgh Railway should be incorporated with certain privileges, they would subscribe the number of shares set opposite their names respectively, and the charter was obtained with the privileges in question, but the defendant, who was one of the subscribers above mentioned, refused to take the stock, and it was held, that the promise was without consideration, and therefore not a contract, but a mere naked expression

*SECTION XIII.

SPECIFIC PERFORMANCE IN COURTS OF EQUITY.

§ 14. But the courts of equity have been mainly influenced by what they esteem the policy of enforcing these parliamentary contracts, for the arrangement of conflicting interests, in regard to such projected railways. And they have declined to interfere, by injunction, where no such contract had been definitely made,[1] notwithstanding such representations on the part of the pro-

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of intention, which equity will not enforce by specific performance, and that if it was a binding agreement it should be enforced at law.

Leave has sometimes been given by courts of equity to oppose a bill in parliament, unless certain compromises, between the projectors and landholders on the proposed line should be effected. Davis *v.* Combermere, 3 Railw. C. 506; Monypenny *v.* Monypenny, 4 Railw. C. 226.

It is said in a late English work upon the subject, Hodges on Railways, 164, that it is well settled, that agreements made with railway companies by landholders, to sell their lands, and to withdraw or withhold opposition to a bill in parliament, are not illegal. See also Capper *v.* The Earl of Lindsey, 3 House of Lords Cases, 293; s. c. 14 Eng. L. & Eq. R. 9. This case was first argued in the Court of Exchequer, and subsequently in the Exchequer Chamber, on error, and finally in the House of Lords, in the year 1851. The case is not found in any of the English treatises on railways, except Hodges, and as it was long discussed, at the bar, and thoroughly examined, by almost all the judges, in the House of Lords, it ought perhaps to be regarded, as the final determination of the English courts upon the subject. The question of legality seems to have been taken for granted here. And in the Earl of Lindsay *v.* The Great Northern Railway Co. 19 Eng. L. & Eq. R. 87, 1853, before V. C. *Wood*, it is said, "that the agreement is legal in itself, is now settled, by authority." In this case, which was a contract that the trains should stop at a particular station, the court decreed a specific performance, giving the companies time to make the necessary arrangements, before making the decree absolute.

But one railway company cannot bind itself to defray the expense of an application to parliament, by another company, for the establishment of another line of railway, expected incidentally to benefit the first company. Such contract is beyond the ordinary scope of the powers of a railway company, and consequently illegal, and such a covenant cannot be enforced in a court of law, however beneficial to the covenantor the objects of the covenant, if carried out, might be. East Anglian Railway Company *v.* The Eastern Counties Railway Company, 7 Eng. L. & Eq. R. 505; McGregor *v.* The Deal & Dover Railway Company, 16 id. 180; *Ante*, § 56, 187.

1 Hargreaves *v.* Lancaster & Preston J. Railway Company, 1 Railw. Cas. 416.

moters, as misled the agents of the land-owner. Thus showing, very explicitly, that the main ground upon which the English courts of equity have proceeded, in decreeing specific performance, and enforcing it by injunction, has been, to compel good faith on the part of such incorporations, in carrying into effect any contracts on their part. For, it is said by the English courts having obtained advantages, in consequence of the contracts and assurances of the agents employed, in the projects, it would tend to destroy all confidence in any such arrangement, if they were not enforced, which would be * of evil example and tend to great practical inconvenience. But where the parties stand upon their legal rights, as secured in the act of incorporation, a court of equity will not interfere.[2] In a late case these provisional contracts seem to be regarded as conditional, depending, ordinarily, for their obligation, as against the corporation, upon their having done any thing under their charter, which the agreement enabled them to do, so as thereby to have received the benefits of it.[3]

SECTION XIV.

COURTS OF EQUITY WILL RESTRAIN A PARTY FROM OPPOSITION, OR PETITION IN PARLIAMENT.

§ 15. It is held in the English courts of equity altogether competent, and within their appropriate jurisdiction, to restrain a party from opposing a bill in parliament, by petition, if a proper

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[2] Aldred *v.* North Midland Railway Company, 1 Railw. Cas. 404; Provost and Fellows of Eton College *v.* Great Western Railway Company, 1 Railw. Cas. 200.

[3] Gooday *v.* Colchester & Stour Valley Railway Company, 15 Eng. L. & Eq. R. 596. In this case the Master of the Rolls said, "Since the act was obtained, nothing has been done nor any step taken, to construct the railway. There is no distinct evidence indeed, that the railway has been abandoned, but no money has been paid, no land taken, nor any movement made towards carrying on the scheme, and the compulsory powers of the act have never ceased. Under these circumstances, I cannot say, that the company has adopted the agreement, or is bound by its terms; and therefore I do not think I can compel them to admit the contract, in an action at law." Very recently, in Williams *v.* The St. George's Harbor Company, 30 Law Times, 84, it was held by the Master of the Rolls, that an agreement entered into by the promoters of a company before incorporation, is not binding on the company when incorporated, unless they subsequently do some act amounting to an adoption of it. This seems now to be the settled doctrine in the English courts.

case is made out, and by parity of reason from pursuing a petition in favor of an act of parliament.[1] But such cases are not common * in practice, and dependent upon peculiar circumstances. As where proceedings in parliament are in violation of express covenants, or for some other reason, in bad faith, and where damages, at law, are no adequate compensation. These cases are therefore determined much upon the same grounds as other cases of specific performance, and come properly under consideration in this connection.

SECTION XV.

CONTRACTS TO WITHDRAW OPPOSITION TO RAILWAY PROJECTS, AND TO KEEP THIS SECRET, AGAINST SOUND POLICY, AND WOULD SEEM TO BE ILLEGAL.

§ 16. The principle of the foregoing decisions, upon the subject of specific performance of contracts, with the promoters of railway projects, being enforced in courts of equity, against the company, is, to say the least of it, somewhat obscure. Regarded, as illegal contracts, it does not seem very apparent how they can, with much show of consistency, be specifically enforced in a court of equity. Ordinarily such contracts are not the subject of an action, for their enforcement, in any court. That there may be extreme cases, where one has gained an unconscionable advantage, by enticing a less experienced person into participation, in an illegal transaction, that a court of equity will compel the successful party to relinquish the fruits of the fraud, may be true.

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[1] The Stockton & Hartlepool Railway Company *v.* The Leeds & Thirsk and The Clarence Railway Companies, 5 Railw. Cas. 691. In this case the injunction was granted by the Vice-Chancellor of England, *Shadwell*, but the order discharged, by the Lord Chancellor, *Cottenham*, on the ground, that no proper case, for the interference of a court of equity, was made out, but distinctly affirming the jurisdiction. The Lord Chancellor says: "This court, therefore, if it see a proper case, connected with private property, or interest, has just the same jurisdiction to restrain a party from petitioning against a bill in parliament, as if he were bringing an action at law, or asserting any other right, connected with the enjoyment of the property or interest which he claims." Heathcote *v.* The North Staffordshire Railway Company, 6 Railw. Cas. 358. In this last case it was held by the Lord Chancellor, that a contract to make a railway is not one of which a court of equity will compel the specific performance, but will leave the parties to their legal rights.

But the general proposition laid down, by Lord *Eldon*, upon this subject in the Vauxhall Bridge case,[1] does not seem to gain much support from the case cited by him.[2]

It seems to us impossible to justify such contracts, beyond the *mere sale of a definite pecuniary interest. And even that, it seems to us, should be secured by the insertion of definite provisions in the charter. We cannot find that any attempt has been made, in this country, to enforce against a corporation, a contract made with the promoters, to quiet opposition, in the legislature. That it is often charged, that such, and similar contracts, are made by the promoters of railway projects, with the friends of rival projects, and other opposers, and with the members of the legislature even, and large sums of money disbursed, in fulfilment of such contracts, which is expected to be refunded by the company, and which is so refunded sometimes, is undeniable. But we apprehend, there is in this country, but one opinion in regard to the legality and decency of such contracts, and that those who expect to profit by them, have far too much sagacity, to trust their redress to the judicial tribunals of the country. But that turnpike and bridge companies, and existing railways, whose profits are to be seriously affected, by the establishment of new railways, and land-owners, whose property is to be affected by such railways, may properly stipulate, for reasonable indemnity, as the price of withdrawing opposition, there can be, we apprehend, no question. But it seems to us, that the only proper mode of securing this indemnity is, by the insertion of special clauses, in the charter of the new company. There can be no question in regard to the duty of courts of equity, in a proper case for their interference, to enforce an indemnity secured by the act.[3]

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[1] *Ante*, § 7, Jacob, 64.

[2] Neville *v.* Wilkinson, 1 Brown, C. C. 543. The principle of this case, if we comprehend it, is a familiar one. It is that one who has represented to a creditor of his debtor, or to the father of the intended wife of his debtor, that his debt did not exceed a specified sum, shall not be allowed to enforce against such debtor any larger sum, the marriage having taken place in confidence of such representation. This representation was made indeed by connivance, between the husband, and his creditor, to deceive his wife's father. But so far as the creditor is concerned, the decision seems to rest upon the familiar principle of an estoppel *in pais*. Shirley *v.* Ferrers, cited in St. John *v.* St. John, 11 Vesey, 536.

[3] Gray *v.* The Liverpool & Bury Railway, 4 Railw. C. 235; *ante*, § 181.

We infer from the late decision of the House of Lords upon this subject, that the views of the courts, in that country, are already undergoing some change upon this subject. In the case of Caledonian and Dumbartonshire Junction Railway *v.* Helensburgh Harbor Trustees,[4] the facts were that the magistrates of Helensburgh agreed with the provisional committee of a projected railway company, to allow the company certain privileges of taking land in the town, and laying rails for a side track, to the harbor of H., the company to pay all the expenses of enlarging the harbor, and of obtaining an act of parliament, for that purpose. The Harbor Act was obtained, and also the Railway Act. In the latter there was no provision authorizing, or referring to, the previous * agreement, and the railway company refused to perform their part, and did not claim performance of the other part.

On a bill for specific performance, brought by the harbor trustees, held, reversing the decision of the court of session, that specific performance could not be decreed, because the railway company had no power to make a harbor, which would be entirely beside the object of their incorporation.

It is said by the Lord Chancellor, and by Lord Brougham, "It seems that Edwards *v.* The Grand Junction Railway, 1 Railw. C. 173, and Lord Petre *v.* The Eastern Counties Railway, id. 462, and other similar cases, which have followed them, are unsupported in principle, but these cases are distinguished from the present, by the nature of the contracts sought to be enforced, which were matters within the scope of the respective charters. The custom sometimes adopted by committees in parliament of omitting special clauses from acts of incorporation, on the agreement of the promoters, that the objects proposed to be attained by these clauses, should be carried out, appears to be illegal, and improper."

It seems very obvious, that if these clauses can be foisted into the act of incorporation, by oral testimony, at the will of interested parties, it is exposing the operation of the act, to all the inconveniences and inconsistencies, which might be expected to follow, from subjecting written contracts to the same mode of

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[4] Before the House of Lords in June, 1856; Law Rep. Oct. 1856, 350; s. c. 2 Macq. H. of L. 391; s. c. 39 Eng. L. & Eq. R. 28.

exposition. Sound views and true policy, seem to us, to require a strict adherence to the act of the legislature, as in other cases.

And it is very questionable, whether, in this country, the contract to sell a definite pecuniary interest,—as land which is required for the construction of the road, or turnpike and canal property, the value of which is to be seriously affected by the railway going into operation,—at a price agreed, made with the promoters of the railway, but not inserted in the act, and which is not unreasonable, can be enforced against the company. It is certain, we think, that a contract going altogether beyond this, and stipulating large sums, beyond the supposed value of any pecuniary interest to be secured, and for the obvious purpose of quieting opposition, or securing favor and support, could not be enforced here, even against the contracting parties, and much less against the company, or at all events that it ought not to be.[5]

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[5] And in the more recent cases upon this subject very little countenance is given to the doctrine of the earlier English cases, which held the contracts of the * promoters of railways binding upon the company, upon the slightest grounds of adoption, and often by the most forced constructions. In the case of Preston *v.* Liverpool, Manchester & N. Railway, 35 Eng. L. & Eq. R. 92, although the case is professedly decided upon the construction of the particular contract, yet it is not difficult to perceive, in the very sensible reasons assigned for the construction adopted, a manifest disposition to abandon the former ground, assumed by the courts upon this subject. The point is thus stated in the note to this latter case: "H. & Y. projectors of a railway company entered into a treaty with the plaintiff, (a land-owner,) whereby the latter agreed not to oppose their bill in parliament, and an agreement was executed, by them, as the executive directors of the railway company, by which the company, upon its incorporation, was to pay to the plaintiff 1,000*l.* for land of which he was the freeholder, and which was required for the purpose of making the railway, and 4,000*l.* for residential damages. There were other stipulations in regard to tunnelling a portion of plaintiff's property, and erecting a station upon another portion. The company was incorporated, but not being able to raise sufficient funds, no attempt was made to construct the railway, and the money subscribed was returned to the shareholders. Held that the contract was conditional, upon the making of the railway, and therefore that the plaintiff was not entitled to moneys payable thereunder. And quære, whether a company can be considered, as the successors or assignees of the projectors, so as to come into existence subject to their contracts." See Ed. P. & Dundee Railway *v.* Philip, in Ho. L. 28 Law T. 345. 39 Eng. L. & Eq. R. 41.

In the recent case of the Bank of Pennsylvania *v.* Commonwealth, 19 Penn.

*APPENDIX B.

CHAPTER XII.

REMEDIES BY LAND-OWNERS UNDER THE ENGLISH STATUTE.

SECTION I.

COMPANY BOUND TO PURCHASE THE WHOLE OF A HOUSE, ETC.

§ 86. By the English statute,[1] railway companies are bound to purchase the whole of a house and lands adjoining, if required, where they give notice to take part; and also if the house or the principal portion of it, be within fifty feet of the railway, and deteriorated by it. The act includes house, garden, yard, warehouse, building, or manufactory; but it was considered, that this did not extend to a lumber-yard.[2] Under a similar provision, in a special charter, it was held, that the company were not bound to take the entire premises, where the principal dwelling-house only, was within the prescribed limit.[3]

It has been considered that this statute gave an option to the land-owner, whether the company should take the whole, or part

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144, the court said, "In interpreting an act of incorporation, the court will not examine what took place, while it was passing through the legislature."

It was held also, in Commonwealth *v.* Fitchburg Railway, 8 Cush. R. 240, that the petitions to the legislature, upon which the act was granted, were inadmissible, upon the question of construction of the act, in regard to the course and direction of the line of the road.

1 8 & 9 Vict. ch. 18, § 92.

2 Stone *v.* Commercial Railway, 9 Simons, 621; s. c. 1 Railw. C. 375; Reg. *v.* Sheriff of Middlesex, 3 Railw. C. 396.

3 Reg. *v.* L. & Greenw. Railway Co. 3 Railw. C. 138.

of the house, so situated.[4] And in this last case it was held, that *a narrow strip of land adjoining an iron and tin-plate factory, which had been used as a place of deposit for rubbish, and over which, a person had a right of way, was such a part of the manufactory, that the company were bound to take the whole.[4]

It has also been determined, that the railway, after giving notice to purchase part of a house, &c., and being required, by the owner, to take the whole, cannot be compelled by mandamus to take the whole, as the act of parliament imposes no such obligation. The statute is intended to protect the owner from

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[4] Sparrow *v.* The Oxford, Worcester, & Wolverhampton Railway, 13 Eng. L. & Eq. R. 33. By Lord *Cranworth* and Sir *Knight Bruce*, L. J. See also Barker *v.* N. Staffordshire Railway, 5 Railw. C. 401, 419, where Lord *Cottenham*, Ch., intimates an opinion, that certain parcels of land (and a brine-pit and steam-engine upon one of them) adjoining salt-works, are not a part of the manufactory. But his lordship gives a very satisfactory reason for denying the aid of the court, viz: "That a party having known his rights, and having had his claim, in respect of them, disposed of, [upon the original bill, and by leave of court then filing a supplemental bill,] if he then raises a new ground of equity, does not present his case in a form, to entitle him to ask for the extraordinary interposition of this court."

In Sparrow *v.* The Oxford, &c. Railway Co. 13 Eng. L. & Eq. R. 33, Lord *Cranworth*, L. J., made some very significant suggestions, in regard to the rights of land-owners to compensation. "The only remaining question," said his lordship, "is one which has been raised now for the first time, namely, that if they cannot take the land, they are now entitled to burrow under it, as it were to make a tunnel, which they say they are able and willing to do, without taking, or touching, any part of the surface. It was argued in this way, 'Suppose the manufactory were, at the top of a hill, and you were burrowing under it, at the distance of a thousand feet, are they then taking part of the manufactory?' I do not feel myself called upon to answer that question, but if I were, I rather believe you are, on the principle of the maxim, *Cujus est solum, ejus est usque ad inferos*. Do you mean to say, that if you are an inch below the surface, you would not be taking any part of the manufactory? I am inclined to think that however deep below [the tunnel was made,] it would be within the enactment. If that has been a *casus omissus* I think it ought to be construed in a way most favorable to those, who are seeking to defend their property from invasion." In the case of Ramsden *v.* The Manchester S. Junction Railway, 1 Exch. R. 723, it was determined, that a railway company could not tunnel, even a highway, without first making compensation, to the owner of the freehold, under the Land Clauses Act. The company are not bound to take property more than fifty feet from the centre line of the road, unless it is incapable of separation. Queen *v.* London & G. Railway, 3 Ad. & Ell. (N. S.) 166.

being compelled to sell a part, but does not compel a company, wanting a part only, to take the whole, if they choose to waive their claim altogether, and the mandamus having claimed the whole, could not go for a part only.[5]

*SECTION II.

THE COMPANY COMPELLABLE TO TAKE INTERSECTED LANDS, AND THE OWNER TO SELL.

§ 87. By the 93d section of the English statute the company is compellable to take lands, not in a town, or built upon, which are so intersected by the works, as to leave either on one, or both sides, a less quantity of land than half a statute acre.

And by section 94 if the quantity of land left on either side of the works,[1] is of less value than a railway crossing, and the owner have not other lands adjoining, and require the promoters to make the crossing, the owner may be compelled to sell the land.

It was held, that the term "town" in a turnpike act, imported a "collection of houses," and that the extent of the town was to be determined by the popular sense of the term, and to include all that might fairly be said to dwell together.[2]

And in another case, it is said, that the term includes all the houses, which are continuous, and that this includes all open spaces occupied, as mere accessories to such houses.[3]

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5 Queen *v.* The London & S. W. Railway Co. 5 Railw. C. 669. The remark of Lord *Denman*, in closing his opinion, in this case, is applicable to similar cases everywhere. "We have to lament the waste of time that has occurred, from the obscurity thrown about the case, by the superfluous matter foisted into the record."

1 8 and 9 Vict. ch. 18, § 93 and 94; Falls *v.* Belfast & B. Railway, 11 Irish L. R. 184. This statute does not apply to lands in a town or built upon. Marriage *v.* The Eastern Co's. R. and the London & B. Railw. 30 Law Times, 264.

2 Reg. *v.* Cottle, 3 Eng. L. & Eq. R. 474.

3 Elliott *v.* South Devon Railway, 2 Exch. R. 725.

SECTION III.

EFFECT OF NOTICE TO TREAT FOR THE PURCHASE OF LAND.

§ 88. Inasmuch as the time for taking land, by the English statute, is limited to three years, an important question has arisen there, in regard to the effect of instituting proceedings, by giving notice to treat, within the time limited, although not in season to have the matter brought to a close before its expiration.

This having been done, and the land-owner having intimated his desire, that a jury should be summoned, but the company taking no further steps, the question was, whether a writ of mandamus would lie, after the prescribed period had elapsed, to compel *the company to proceed to summon a jury. It was determined in the affirmative.[1]

So, too, where the company have taken possession of land, by depositing the value of the land in the Bank of England, and executing a bond to the party to secure payment, subject to future proceedings, as they may do, and where the company took no further steps, to ascertain the sum to be paid by them, as compensation, until the time limited for exercising their compulsory powers had expired, it was held that having rightfully entered upon the land, before the expiration of the prescribed period, an ejectment could not be maintained against them, after that period. The proper remedy for the land-owner is by writ of mandamus.[2]

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[1] The Queen *v.* Birmingham and Oxford Junction Railway, 6 Railw. C. 628; Birmingham and Oxford Junc. Railway Co. *v.* Regina, 4 Eng. L. & Eq. R. 276, where the judgment of the Q. B. was fully affirmed in the Exchequer Chamber. The court say, "The notice to treat is an inchoate purchase, and after that has been given, in due time, it is competent for the land-owner to compel the completion of the purchase." But where an annuitant, having power to enter upon land and distrain for his security, was served with notice, by a railway company of their intention to purchase, and the company subsequently purchased the property of a prior mortgagee, who had a power of sale, it was held the annuitant could not, in equity compel the company to pay the owners of the annuity, he alleging no fraud, or other improper conduct, on the part of the company. Hill *v.* Great N. R. 27 Eng. L. & Eq. R. 198, reversing the decision of one of the vice-chancellors in s. c. 23 Eng. L. & Eq. R. 565.

[2] Doe *d.* Armistead *v.* The N. Staffordshire Railway, 4 Eng. L. & Eq. R. 216.

So, too, if they have made the deposit, and given a bond for the payment of the price, under this same section[3] a day before the efflux of the time limited, although they had not entered upon the land, their powers to purchase, or enter upon the lands, are saved.[3]

*SECTION IV.

REQUISITES OF THE NOTICE TO TREAT.

§ 89. As by the English statute, the notice to treat is made the act of purchase, it is of the first importance, that it should describe the lands accurately. But even where the notice was indefinite, if it be accompanied with a plan, which shows the very land proposed to be taken, it will be sufficient;[1] or reference may be made to the parliamentary plan.[1] The company can only claim to use what their notice and the annexed plan shows clearly was submitted to the appraisers to value.[2]

It was held long ago, in the English courts, under similar statutes, for taking land, by compulsion, that the notice to treat constituted the act of purchase, and that after giving it, there remained no longer, to the company, any power to retract, and they will be compelled by mandamus to complete the purchase.[3]

The expression "deviation" which appears in the acts of parliament and in the English cases, is here determined to import the distance from the line of railway upon the parliamentary plans which are the basis of the charter, and one hundred yards "deviation" is commonly allowed, in the acts. Worsley *v.* The South Devon Railway Co. id. 223.

3 The Marquis of Salisbury *v.* The Great Northern Railway Co. 10 Eng. L. & Eq. R. 344. The position is here distinctly assumed, that after the notice to treat, the parties stand in the relation of vendor and purchaser, and the company are not at liberty to recede. All the after proceedings are merely for the purpose of ascertaining the price of the land. Sparrow *v.* Oxford and Worcester Railway Co. 9 Hare, 436; 12 Eng. L. & Eq. R. 249.

1 Sims *v.* The Commercial Railway, 1 Railw. C. 431; Hodges on Railways, 197.

2 Kemp *v.* The London & Br. Railway Co. 1 Railw. C. 495.

3 The King *v.* Hungerford Market Co. 4 B. & Ad. 327; Same *v.* Commissioners of Manchester, id. 332, n.; Doo *v.* The London & Cr. Railway, 1 Railw. C. 257; Burkinshaw *v.* Birm. & Ox. Junc. Railway Co. 5 Exch. R. 475; 4 Eng. L. & Eq. R. 489; Ed. & Dundee Railway Co. *v.* Leven, 1 Mac. House of Lords

And where the company had given notice to take twenty perches of land, they cannot subsequently give notice to restrict the land to one perch.[4] But the company having issued one notice, may issue a second, requiring additional lands.[5] They are at liberty, by new notices, from time to time, to take such additional lands, as the progress of the work shows will be requisite.

Nor will the company be deprived of the power to take land for the necessary use of the works, when the emergency arises, by having previously attempted to take it, for other purposes, not warranted by their act.[6]

* And the company having opened their main line for travel, but not completed the stations and works, are at liberty to take any lands, within the limits of deviation, for a branch railway.[7]

But it was held, that, where the Commissioners of Woods and Forests, gave notice of taking lands for a public park, as they were acting in a public capacity, the notice given by them did not constitute a quasi contract, enforceable by mandamus.[8]

SECTION V.

THE NOTICE MAY BE WAIVED, BY THE PARTY ENTERING INTO NEGOTIATION.

§ 90. It is a general rule in regard to all summary and inferior jurisdictions, that the basis of their jurisdiction must appear upon the face of the proceedings.[1] Hence in proceedings to take

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Cases, 284; Stone *v.* The Commercial Railway Co. 1 Railw. C. 375. When variance from notice will not vitiate precept, see Walker *v.* The London & Bl. Railway Co. 3 Ad. & Ellis, (N. S.) Q. B. 744; see *ante*, § 88, and notes.

4 Tawney *v.* Lynn & Ely Railway Co. 4 Railw. C. 615.

5 Stamps *v.* Bir. Wolv. & Stour Valley Railway, 6 Railw. C. 123; s. c. 7 Hare, 251.

6 Webb *v.* Manchester & Leeds Railway, 1 Railw. C. 576; Simpson *v.* Lancaster & Carlisle Railway, 4 Railw. C. 625; Williams *v.* South Wales Railway Co. 13 Jur. 443; s. c. 3 DeG. & S. 354.

7 Sadd *v.* The Maldon, W. & Braintree Railway Co. 2 Eng. L. & Eq. R. 410.

8 Queen *v.* The Comm. of Woods & Forests, (*Ex parte* Budge,) 15 Ad. & Ellis, (N. S.) 761.

1 Rex *v.* Bagshaw, 7 T. R. 363; Rex *v.* Mayor of Liverpool, 4 Burrow, R. 2244; Rex *v.* Trustees of the Norwich Roads, 5 Ad. & Ellis, 563.

land, *in invitum*, under a notice to treat, the notice being regarded, as essential to the jurisdiction, it has more generally been held indispensable to the jurisdiction, that it should be set forth upon the proceedings.[1]

But where the land-owner enters into negotiation, with the company, and agrees to waive the notice, he is afterwards estopped from taking the objection, that he never received notice.[2] And it was held, that the party, whose duty it was to give the notice, and who was shown, by the returns, to have appeared before the jury, cannot object to the inquisition, upon the ground, that it did not disclose a proper notice to treat.[3]

In another case, where application was made to the King's Bench, to issue a *certiorari*, to bring up and quash an inquisition for land damages, in a railway case, on the ground of some alleged defect, the court say, the granting the writ is matter of discretion, though there are fatal defects, on the face of the proceedings which it is sought to bring up; and that it is almost an invariable rule, * to deny the writ, where it appears the party has suffered no injury, or has assented to the proceedings below.[4]

SECTION VI.

TITLE OF THE CLAIMANT MUST BE DISTINCTLY STATED.

§ 91. In reply to a notice to treat, the claimant may state the particulars of his claim, and proceed to treat. In this case the statement should give a clear description of the claimant's interest in the land, as a defect here is liable to affect the validity of the after proceedings.

In one case where the claimant's answer, to the notice to treat, stated, that, as trustees under a will, they claimed an estate in copyhold, and a certain sum, as compensation for their interest in the lands, and appointed an arbitrator, and the other party appointing one, and an umpire being agreed upon, he awarded a certain sum, as the value, to be paid to the trustees, "for the purchase of the fee-simple, in possession, free from all incumbrances;" the company applying to set aside the award, upon

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2 Reg. *v.* The Committee for the South Holland Drainage, 8 Ad. & Ellis, 429.

3 Reg. *v.* The Trustees of Swansea Harbor, 8 Ad. & Ellis, 439.

4 Reg. *v.* The Manchester & Leeds Railway Co. 8 Ad. & Ellis, 413.

the ground that other persons claimed an interest in the lands, the court held the award bad, for not finding the interest of the claimants in the land, or that they had a fee-simple, which it appraised. But the court did not set the award aside, but left the company to dispute it, when it should be attempted to be enforced.[1]

If the lands are in possession of a receiver, or the committee of a lunatic, a special application should be made to the Court of Chancery.[2] The claimant cannot object, that the award describes the land, as a fee-simple, in possession, whereas, the land is in possession of a tenant. Lord *Denman*, Ch. J., in giving judgment, says, "The answer is, that such assumption, if really made, is in favor of the claimant, and therefore no matter of complaint for him. But it does not appear clearly, that any such assumption *was made. The expression 'fee-simple in possession,' in the claim, is used in contradistinction to fee-simple in reversion, or remainder."[3]

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[1] The North Staffordshire Railway Co. *v.* Landor, 2 Exch. R. 235.

[2] *In re* Taylor and York N. Midland Railway, 6 Railw. Cas. 741. In this case the Lord Chancellor said, "All the world ought to be aware, that the sanction of the Lord Chancellor is necessary to be obtained in the first instance, in cases like the present."

[3] Bradshaw and The East & W. I. Docks & Birmingham J. Railway Co. 12 Ad. & Ellis, (N. S.) 562. The vendor of land to a railway company, does not waive his lien for damages, by accepting a certificate of deposit made by the cashier of the company, for the purchase-money, the money not being paid when called for. Mims *v.* Macon & W. Railway Co. 3 Kelly, 333. Where a company received a grant of certain salt mines, subject to a condition, which they did not comply with, but retained the lands for a different purpose, and afterwards when the period for performing the condition had expired, a general grant of all unoccupied salt lands in the state, necessary to use, for constructing a railway, was made to a railway company, who proceeded and occupied the lands above-named, it was held that the first grantors had no interest, or title, enabling them to maintain an action for damages. "They had the lands set apart to their use, for making salt, and had no right to enter upon, and occupy them for any other purpose," are the words of the court. Parmerlee *v.* Oswego & Syracuse R. R. Co. 7 Barb. 593.

The statute of Pennsylvania gives the right to construct lateral railways over intervening lands, to the owner of lands, mills, quarries, coal, or other mines, lime-kilns, or other real estate, in the vicinity of any railway, canal, or slack-water navigation. It was held, that one who was in possession of the land, on which a coal-mine was, at the commencement of the proceeding to recover land damages, and who had erected a two-story dwelling-house upon the land, was

*SECTION VII.

THE CLAIM OF THE LAND-OWNER MUST CORRESPOND WITH THE NOTICE.

§ 92. In one case the claim of the land-owner described more land, than the notice to treat, being intersected land, less than one half acre, which the company are bound to take, if so required. But the claim did not properly designate the portion, which, it was claimed, the company should take, under their notice, and that which they were required to take, as intersected land. The umpire received evidence as to the value of the intersected land, and awarded one entire sum, as compensation, for the whole. Held that the award was bad, there being no valid submission, as to intersected lands.[1]

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an owner of the coal-mine, within the act. Shoenberger *v.* Mulhollan, 8 Barr, 134. It is sufficient in such case that the petition be signed by the lessee and agent of the owner. Harvey *v.* Lloyd, 3 Barr, 331.

It is considered necessary that the mortgagee of land should become a party to the proceedings for condemning, or granting land to a railway, in order to give good title to the company. Stewart *v.* Raymond Railway, 7 S. & Mar. 568. Or that he should give his consent, in writing, in the case, to the proceeding, taken by the mortgagor. Meacham *v.* Fitchburg Railway, 4 Cush. 291; 1 Am. Railw. Cas. 584.

Where the state held land for a state prison, and granted the charter of a railway, in the usual form, authorizing the company to locate their road, so that it might pass over the land of the state, so held, but without any expression in the act of a design to aid the company, in their undertaking, it was held the state might recover damages for the land taken. The court say, "The inquiry relates solely to the property of the commonwealth, which it holds in fee, in its capacity, as a body politic. It appears to us the question is purely one of intention." "We think if the legislature had intended to aid the enterprise, by an appropriation of money, land, or other means—such aid being unusual—the purpose to do so would have been in some way expressed." Commonwealth *v.* Boston & Maine Railway, 3 Cush. 25; 1 Am. Railw. Cas. 482, 496, 497.

[1] The N. Staffordshire R. Co. *v.* Wood, 2 Exchcq. R. 244.

*CHAPTER XIII.

ENTRY UPON LANDS BEFORE COMPENSATION IS ASSESSED.

SECTION I.

LANDS TAKEN OR INJURIOUSLY AFFECTED, WITHOUT HAVING PREVIOUSLY MADE COMPENSATION TO THE PARTIES.

§ 93. The eighty-fourth section of the English statute, The Lands Clauses, &c. provides that no entry shall be made upon any lands, by the company, until compensation shall have been made, under the act, or deposited in the Bank of England, except for the purpose of preliminary surveys, and probing, or boring, to ascertain the nature of the soil, which may be done, by giving notice, not more than fourteen days, or less than three days, and making compensation for any damage, thereby occasioned to the owners, or occupiers of such lands.

It has been considered, that if the company enter upon lands, without complying with the requisitions of the statute, they are liable in trespass, or ejectment.[1] And in some cases an injunction will be granted. But where the company entered to make preliminary surveys, without giving the requisite notice, the court refused to order the injunction, but reserved the question of costs.[2]

And where the entry was regularly made upon the land, for *preliminary surveys, and afterwards the contractors, without the knowledge of the corporation, but with the consent of the occupying tenants, brought some of their wagons, and rails, and

[1] Doe *d.* Hutchinson *v.* The Manchester, Bury, and Rosendale Railway, 14 M. & W. 687.

[2] Fooks *v.* The Wilts, Somerset, and Weymouth Railway Co. 5 Hare, 199; s. c. 4 Railw. C. 210. In this case, the injunction was denied chiefly upon the ground, that the alleged trespass was complete before the application. The court intimate, that if the company should attempt to proceed further, it might be proper to restrain them by injunction. The point, of the company being in the wrong, is distinctly recognized, by the court.

other implements, upon the land, but did not commence the works or do any damage, and this was without the assent of the owner, and his agent thereupon filed a bill to obtain an injunction, against taking possession of the lands, until they had complied with the statute, the vice-chancellor said, that although the company were bound, by the acts of their contractors, the acts done were not a taking possession, within the meaning of the statute, and that the bill was improperly filed.[3]

But where the company agreed with the land-owner, that the question of compensation should be settled, by arbitration, and thereupon entered upon the land, by consent of the owner, and the arbitrator made an award, which became the subject of dispute, and the owner thereupon gave the company notice to quit, and brought ejectment, it was held he could not recover, although the company had not tendered the money awarded, or a conveyance, but, that the owner's remedy was to proceed upon the award.[4] The notice to quit under the circumstances did not make the company trespassers.

By the eighty-fifth section, if the company find it necessary to enter upon land, for the purpose of carrying forward their works, before the amount of compensation can be settled, they may deposit in the bank the amount claimed, or in other cases the appraisal, and also give the party a bond, with surety, to be approved by two justices in a penal sum, equal to the amount, so deposited, conditioned for the payment, or deposit of the amount finally fixed, as the ultimate value, and interest thereon, and then take possession of the land and proceed with their works. The company can obtain their money, so soon as the condition of the bond has been complied with. But the vendor must join in the petition, for the money to be paid the company, or else it must be shown, that he has been served with a copy of the petition.[5]

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[3] Standish *v.* Mayor of Liverpool, 1 Drewry, 1; s. c. 15 Eng. L. & Eq. R. 255.

[4] Doe *d.* Hudson *v.* The Leeds and Bradford Railway Co. 6 Eng. L. & Eq. R. 283. The decision here goes chiefly upon the ground of the consent of the land-owner to the entry of the company, and to refer the compensation to an arbitrator.

[5] *Ex parte* South Wales Railway Co. 6 Railw. C. 151. But in *ex parte* The Eastern Counties Railway Co. 5 Railw. C. 210, the money was ordered to be paid to the company upon affidavits showing the claim settled. The land-owner has no lien upon the money deposited for costs, but the company are entitled to the money upon payment of the sum finally settled for the value of the land

It * does not invalidate the bond, if it bear date before the date of the valuation.[6]

SECTION II.

THE PROCEEDINGS REQUISITE TO ENABLE THE COMPANY TO ENTER UPON LAND.

§ 94. In some cases specified in the English statute, it is necessary to have a provisional valuation of land, by a surveyor appointed by two justices, to determine the amount of the security to be given before the entry of the company upon the land. Where in such cases the justices appointed a surveyor, who had all along acted for the company, to appraise the value; it was held no sufficient reason to interfere, by injunction, but the court reprobated such a practice. The court also declined to interfere, by injunction, on the ground, that the sureties on the bond, were

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The Great Northern Railway Co. *ex parte*, 5 Railw. Cases, 269; London and South W. R. *ex parte* Stevens, 5 Railw. C. 437.

The bond must be given in the very terms of the statute. Hosking *v.* Phillips, 3 Exch. R. 168, opinion of *Parke*, B. And it will make no difference that the obligee is a gainer by the deviation from the statute. Poynder *v.* G. N. Railway Co. 5 Railw. C. 196.

But where the company choose to treat for the claimants' title only, it is sufficient if the bond follow the statute, so far as it applies to that particular case. Willey *v.* Southeastern Railway Co. 6 Railway Cas. 100. Opinion of Lord Chancellor, 107–8. If the company enter by consent of the tenant, and do permanent damage to the land, the *owner* may nevertheless obtain an injunction and compel them to make a deposit, and give a bond, as required by the statute. Armstrong *v.* Waterford and Limerick Railway Co. 10 Irish Eq. R. 60. If there is a mortgage upon land, the company must treat with the mortgagee, or provide for the expense of reinvestment for his benefit, or their entry will be regarded as unlawful. Ranken *v.* East and West India Docks & Bir. J. Railway, 12 Beavan, 298; 19 L. J. Ch. R. 153.

Under the general statutes, in many of the American states, where there are conflicting claims to the land, required by a railway company, the company are required to make application to the court of chancery, and deposit the money, in bank, subject to the final order of that court. In such case it has been considered, that the company had no interest in the controversy, after depositing the money for the price of the land. Haswell *v.* Vermont Central Railway, 23 Vt. 228.

[6] Stamps *v.* Birmingham, Wolverhampton, & Stour Valley Railway, 6 Railw. C. 123.

the company's solicitors, and were upon similar bonds, to a large amount.[1]

*In the same case it was considered, that depositing money and executing a bond to tenants in common, in their joint names, was irregular.[1] It was held that the proceedings under the 85th section of the English act, to obtain possession of the land, before the amount of compensation is settled, may be *ex parte*, and altogether without notice.[2]

The English statute subjects the company to a penalty for entering upon lands before taking the steps required, by the statute, but provides, that the penalty shall not attach to any company, who have *bonâ fide* done what they deemed to be a compliance with the statute.[3]

If one enter upon lands after verdict estimating damages, but before judgment on the verdict, he is liable in trespass, but only for the actual injury, and not for vindictive, or exemplary damages.[4]

It has often been made a question in this country, where the charter of a railway provides one mode of assessing land damages, and a subsequent general railway act provides a different mode, which the company are bound to pursue. It has been held the company might still pursue the course pointed out in their charter.[5]

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[1] Langham *v.* Great Northern Railway Co. 5 Railw. C. 265–6. This case was in favor of five plaintiffs, three tenants in common, and two devisees in trust for the sale of the lands, and it was queried, whether there was not a misjoinder.

[2] Bridges *v.* The Wilts, Somerset, and Weymouth Railway Co. 4 Railw. C. 622. This is a decision of the Lord Chancellor affirming that of the vice-chancellor of England. Poynder *v.* The Great N. Railway Co. 5 Railw. C. 196. In this case the bond was held to be informal, for being made to be performed "on demand," the Lord Chancellor refused a perpetual injunction, but allowed it, till the bond was corrected.

[3] Hutchinson *v.* The Manchester, Bury, and Rosendale Railway Co. 15 M. & W. 314. *Pollock*, Ch. B., thus lays down the rule of construction of this statute: "A penal enactment ought to be strictly construed, but a proviso, which has the effect of saving parties from the consequences of a penal enactment, should be liberally construed."

[4] Harvey *v.* Thomas, 10 Watts, 63.

[5] Vischer *v.* Hudson River Railway, 15 Barbour, 37; Hudson River Railway *v.* Outwater, 3 Sand. Sup. Ct. 689. Ante, § 72, n. at the end.

*SECTION III.

MODE OF OBTAINING COMPENSATION UNDER THE STATUTE, FOR LANDS TAKEN, OR INJURIOUSLY AFFECTED, WHERE NO COMPENSATION IS OFFERED.

§ 95. Where land is taken by the company, or injuriously affected, by their works, and no compensation has been offered, by the company, the claimant may, where the amount exceeds fifty pounds, have the same assessed either by arbitrators, or a jury, at his election.

If he desire to have the same settled, by arbitration, he shall give notice to the company of his claim, stating his interest in the land, and the amount he demands, and unless the company, within twenty-one days, enter into a written agreement, to pay the amount claimed, the same shall be settled, by arbitration, in the manner pointed out in the statute; or if the party desire to have the same settled, by a jury, he shall so state, in his notice of claim, and unless the company agree to pay the sum claimed, in the manner stated above, they shall, within twenty-one days, issue their warrant to the sheriff, to summon a jury, to settle the same, in the manner pointed out in the act, and in default thereof they shall be liable to pay the amount claimed, to be recovered in the superior courts.[1]

SECTION IV.

THE ONUS OF CARRYING FORWARD PROCEEDINGS.

§ 96. It has been held under the English statutes, that after the company have taken possession of land, either by right or by wrong, the *onus* of taking the initiative steps, to have the purchase-money, or compensation, assessed, lies upon the claimant.[1] It was *considered, in this case, that the remedy under

[1] 8 & 9 Vict. ch. 18, § 68.

[1] Adams *v.* The London & Blackwall Railway Co. 6 Railw. C. 271, 282. The opinion of the Lord Ch. on appeal. It was also considered, in this case, that if the company failed to perform their duties, in the proceedings, the more appropriate remedy was by mandamus, and not by application to the courts of equity for decree of specific performance.

the 68th section[2] applied to all cases, where the company took possession of the land under the 85th section.[3]

But if questions in equity are pending, they must be disposed of, before the common-law remedy can be pursued.[4] This was a case where the determination of the matters, pending in equity, was necessary, to enable the parties to know, what was to be submitted to the assessors.[4] In proceedings under the 68th section, it is not necessary for the company to give the claimant notice of their issuing a warrant to the sheriff, to summon a jury, ten days before they issue it, as is required in proceedings under the other sections.[5] It was held, that if the claimant recover a larger sum, than was offered by the company, he is entitled to recover costs, under section 68, as well as under other sections.[5]

It is considered, that the land must be actually taken, or actually injuriously affected, by the company, before the claimant can take proceedings under section 68. Hence if the company give notice of their intention to take lands, but do not afterwards actually take possession, or injuriously affect them, the claimant can only proceed by mandamus. It has been decided, that the claimant, in such case, cannot make a demand of a certain sum, and then recover it, if the company do not issue their warrant to the sheriff.[6]

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[2] See *ante*, § 95.

[3] See *ante*, § 93, 94. Doe *d.* Armistead *v.* North Staffordshire Railway Co. 4 Eng. L. & Eq. R. 216.

[4] Southwestern Railway Co. *v.* Coward, 5 Railw. C. 703.

[5] Railstone *v.* The York, Newcastle, & B. Railway Co. 15 Ad. & Ellis (N. S.) R. 404. This case is somewhat questioned in Richardson *v.* Southeastern Railway, 6 Eng. L. & Eq. R. 426. But in this same case, in error, in the Exchequer Chamber, 9 Eng. L. & R. 464, the question as to costs is affirmed and the court say, it is not necessary to say, whether they consider the case of Railstone *v.* The York, N. & B. Railway Co. sound or not, as it does not necessarily affect the question before the court.

[6] Burkinshaw *v.* Bir. & Oxford J. Railway Co. 5 Exchcq. R. 475.

*SECTION V.

EQUITY WILL NOT INTERFERE, BY INJUNCTION, BECAUSE LANDS ARE BEING INJURIOUSLY AFFECTED, WITHOUT NOTICE TO TREAT, OR PREVIOUS COMPENSATION.

§ 97. It is said courts of equity will not interfere by injunction, because lands are being injuriously affected, by the company's works, and no notice to treat, or previous compensation has been made, if it appears the company are only exercising their statutory powers. The claimant should allow the works to be completed, and then take his remedy under the statute.[1]

It was objected in one case, that the company would be likely to greatly alter the appearance of the land, which they had entered upon, and that a jury could not understandingly assess the value, after the damages were sustained, but the court said, it was no ground for the interference of a court of equity.[2]

The courts in England hold, that in this class of claims, it is proper to wait till the full extent of the injury is known.[3] And equity will not enjoin the party from proceeding under the statute, in a case, where it is alleged, that he has no legal claim under the statute,[4] as in such case, the company may defend against the award, and this seems to be the course finally determined. But some actions at law have been brought and sustained to try the right, by order of the courts of equity.[5]

So, too, where the bill alleges that the party has upon con-

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[1] 8 & 9 Vict. ch. 18, § 68.

[2] Laugham *v.* Great Northern Railway, 5 Railw. C. 263. The counsel for defendant not called to answer this portion of plaintiff's argument.

[3] Hutton *v.* The London & Southw. Railway Co. 7 Hare, 259.

[4] East & West India Docks & Bir. J. Railway Co. *v.* Gattke, 3 Eng. L. & Eq. R. 59; South Staffordshire Railway Co. *v.* Hall, id. 105. In this last case, the opinion of Lord *Cranworth* seems to overrule that of Lord *Cottenham* in The London & N. W. Railway Co. *v.* Smith, 5 Railw. C. 716. The Sutton Harbor Improvement Co. *v.* Hitchins, 9 Eng. L. & Eq. R. 41; The London & N. W. Railway Co. *v.* Bradley, 6 Railw. C. 551. See also Monehet *v.* G. W. Railway Co. 1 Railw. C. 567. But see the case of L. & Y. Railway *v.* Evans, 19 Eng. L. & Eq. R. 295, where the case of L. & N. W. Railway *v.* Smith is still further questioned.

[5] Glover *v.* The North Staffordshire Railway Co. 5 Eng. L. & Eq. R. 335.

sideration, agreed to receive compensation in a particular mode, equity will enjoin him from taking proceedings under the statute.[6]

*SECTION VI.

SHERIFF'S JURY, OR ARBITRATOR, CANNOT DETERMINE THE QUESTION OF RIGHT IN THE CLAIMANT, BUT ONLY THE AMOUNT OF DAMAGES.

§ 98. There has been some contrariety of opinion, among the English judges, in regard to the right of the company, before the sheriff's jury, to raise the question of the claimant's right to recover any compensation, under the sixty-eighth section, where lands are taken, or alleged to be injuriously affected, by the works of the company; and whether the jury can go into any inquiry beyond that of the value of the claimant's interest in the land. The latest decisions upon this point hold, that the jury is confined to the question of the amount of compensation.[1]

In the very latest English case upon this subject,[2] the judges of the Court of Queen's Bench differed in opinion, and delivered opinions *seriatim*. *Coleridge*, J., and Lord *Campbell*, Ch. J., and *Wightman*, J., holding, that the jury had nothing before them, but the *quantum* of damages, and that whether the company declined to issue their warrant to the sheriff, or did issue it, in both cases, the right to recover any damage on account of a claim for the injuriously affecting of land, was to be tried upon the action, to recover the amount assessed, in the courts. The proceedings under the statute, were held, by the majority of the court, to be merely for the purpose of fixing the amount of the claim. If, indeed, the company stood still, upon the question of right, they were liable, in the event of the claimant's recovery, for the full amount of the claim made; but if they proceeded to a hearing before the arbitrator, or the jury, whichever course the claimant should elect, they might not only contest the amount there, but the right of any recovery, in the action, which the claimant was compelled to bring, to obtain execution against the company, but that it was improper to go into any inquiry before the arbitrator, or the jury, in regard to the right to recover any thing, inasmuch

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[6] Duke of Norfolk *v.* Tennant, 10 Eng. L. & Eq. R. 237.

[1] Regina *v.* Metropolitan Comm. of Sewers, 18 Eng. L. & Eq. R. 213.

[2] Regina *v.* The London & Northwestern Railway Co. 25 Eng. L. & Eq. R. 37.

as this tended improperly to embarrass the mind of the triers, in regard to the damages. And in this case where the jury went into the question of right, and determined the claimant had no right, but added, if he had such right, his claim should be valued at £150, the majority of the court determined, that the former part of the verdict could not be rejected, and let the verdict stand, as a good finding of the sum named, which last point seems rather too refined for common apprehension, even after reading attentively, the elaborate opinion of the majority of the court, by *Coleridge*, J.

Mr. Justice *Erle* dissented from the principal decision of the court, and held the verdict good in all respects. But this case must be regarded, as settling the question, of the right of the jury, to pass upon the claim, beyond its mere amount, at least, under the English statutes.

In most of the American states, the assessment of land damages, by whatever tribunal, becomes final, unless appealed from, and execution issues, without resort to a future action, or if an action is necessary upon awards of arbitrators, this will not justify a reëxamination of the case, either upon the question of title, or amount of damages. But in some of the states, the proceedings are similar to those above named in the English courts.[3]

SECTION VII.

THE EXTENT OF COMPENSATION TO LAND-OWNERS, AND OTHER INCIDENTS BY THE ENGLISH STATUTES.

§ 99. In one of the early cases[1] upon this subject Lord *Denman*, Ch. J. said, we think it not unfit to premise, "that where such large powers are intrusted to a company to carry their works through so great an extent of country, without the consent of the owners and occupiers of land, through which they are to pass, it is reasonable and just, that any injury to property, which can be shown to arise from the prosecution of those works, should be fairly compensated to the party sustaining it." But this must be received under some limitations. For it is supposable, that

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[3] *Ante*, § 72.

[1] Reg. *v.* Eastern Counties Railway, 2 Ad. & Ellis, (Q. B.) 347.

possible remote injuries may accrue to property, of a general and public character, which it was never intended to compensate.

Some points arising under the English statute may be here referred to. It was held that where the powers conferred upon a *canal company were unlimited, as to time, no limitation as to their exercise could be assigned, so as to require their exercise within a reasonable time,[2] and, consequently, that the works might be resumed, at any period.[2] Future damages to accrue to land-owners cannot be estimated properly[3] until after the completion of the works.[3] The compensation when given, fixes the rights of the parties, upon the basis of its estimation, as, if the estimation is had upon the footing of an entire severance of the land, the land-owner has no right to cross the track.[4] And where this did not sufficiently appear, by the record of the verdict, that not having been made, held that parol evidence might be given, of the finding, and of the grounds upon which it proceeded.[4]

Where consequential damages to existing works, by the erection of new ones, are required to be compensated, the period for estimation is limited, to the yearly value of the works, antecedent to the passing of the act.[5]

The devisee is entitled to claim consequential damages and not the executor.[6] But where one contracted to sell freehold estates and died, before the money was paid; under the London Bridge Improvement Act, it was held the money should go to the executor.[7] But the cases are not uniform upon this subject

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[2] Thicknesse *v.* The Lancaster Canal Co. 4 M. & W. 472. Lord *Abinger*, Ch. B. intimates an opinion here, that possibly, after a long delay of the company to proceed with their works, and the erection of fences and buildings, by the land-owners, in faith of the abandonment of the works by the company, a court of equity might restrain the company from completing their enterprise, notwithstanding the grant of power to do so, by parliament; but a court of law could do no such thing. p. 490, 491.

[3] Lee *v.* Milner, 2 M. & W. 824.

[4] Manning *v.* The Eastern Counties Railway, 12 M. & W. 237. But unless it appeared, by the record upon what basis the assessment was made, it seems questionable, whether, upon general principles, oral evidence is admissible to show that basis. *Ante*, § 74, n. 7.

[5] Manning *v.* The Commissioner under the W. I. Dock Act, 9 East, R. 165.

[6] The King *v.* The Comm. under London Dock Acts, 12 East, R. 477.

[7] *Ex parte* Hawkins, 3 Railw. C. 505, and note. No other party seems to have had a counter interest in this case.

and the usual course seems to be, that the money for consequential damage, goes to the party interested in the inheritance, or else is divided according to the interest of the several estates.[8] In one case it was held, that the vendee was entitled to compensation, which * accrued during the time of the vendor's title, but not liquidated till after the conveyance.[9]

But in general the vendor is entitled to land damages accruing during his time, although not collected, and often where the works are not completed till after the conveyance.[10] The presumption is, if the jury assess compensation to one person, that it is only for his interest in the premises.[11]

SECTION VIII.

RIGHT TO TEMPORARY USE OF LAND TO ENABLE THE COMPANY TO MAKE ERECTIONS UPON OTHER LANDS.

§ 100. Where one railway act gives the company power to pass another railway, by means of a bridge, provided the width between the abutments of the bridge is not less than twenty-six feet, and at the points where the bridge is to be built, the land of the second company is forty-seven feet wide, the first company have no right to build the abutments of their bridge upon the land of the second company, but having purchased adjoining land for that purpose, they have a right, at law, to the temporary use of the land of the second company, for the purpose of building, and this right was in effect secured to the first company by an injunction out of chancery.[1]

So, too, where a railway company had permission to carry their road over a canal, by means of a bridge of a given description, it was held that they might, as incident to the right of erecting the bridge, make a temporary bridge over the canal, supported partly on piles, driven into the bed of the canal, to enable them to transport earth across the canal to build the

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[8] The Midland Counties Railway Co. *v.* Oswin, 3 Railw. C. 497; Danforth *v.* Smith, 23 Vt. R. 247.

[9] King *v.* Witham Nav. Co. 3 B. & Ald. 454.

[10] Rand *v.* Townshend, 26 Vt. R. 670.

[11] Rex *v.* Nottingham Old Waterworks, 6 Ad. & Ellis, 355.

[1] Great North of England, Clarence & Hartlepool Junction Railway *v.* The Clarence Railway, 1 Collyer, 507.

necessary embankment, in the construction of the permanent bridge.[2]

And such a temporary bridge having been erected for the *bonâ fide* purpose of building the permanent bridge, might also be used for other purposes, for which alone it could not have been erected.[3]

SECTION IX.

RESERVATIONS TO LAND-OWNERS TO BUILD PRIVATE RAILWAY ACROSS PUBLIC RAILWAY.

§ 101. Where the special act of a railway company provided, that nothing in the act contained shall prevent any owner, or occupier, of any ground, through which the railway may pass from carrying at his or their own expense, any railway, or other road, any cut, or canal, which he, or they may lawfully make in their own land, across the said main railway, within the lands of such owner, or occupier, it was held, that this provision was not confined to the owners, or occupiers, of such land, at the time, but was intended to apply to all future time, so long as such principal railway shall continue, and extended to all persons owning, or occupying lands adjoining the railway, upon opposite sides, whenever the title was acquired, even where they purchased the land upon opposite sides, at different times.[1]

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[2] London and Birmingham Railway *v.* Grand Junction Canal Co. 1 Railw. Cas. 224.

[3] Priestley *v.* The Manchester & Leeds Railway, 2 Railw. C. 134.

[1] Monkland & Kir. Railway *v.* Dixon, 3 Railw. C. 273. The court here (H of L.) denied an interdict against such owner or occupier, prolonging his railway, for the benefit of any persons, with whom he might make an agreement for that purpose.

*CHAPTER XIV.

THE MODE OF ASSESSING COMPENSATION UNDER THE ENGLISH STATUTES.

SECTION I.

BY JUSTICES OF THE PEACE.

§ 102. By the English statute, where the compensation claimed shall not exceed £50, the same is to be settled by two justices. So, also, as to damages claimed for lands, injuriously affected. So, too, if the company enter upon any private road, or way. And justices may fix the compensation, in certain cases, for the temporary use of land. And the compensation to tenants for a year, or from year to year. They may apportion the rent, too, where the whole land is not taken. In some of these cases, their jurisdiction extends beyond £50.

The mode of enforcing payment of money awarded, by such justices, is to obtain an order, which may be enforced by distress, upon the goods and chattels of the party liable. The *certiorari* is taken away in such cases, but an order of such justices may still be brought up, to be quashed, for want of jurisdiction.[1]

The justices are to take into consideration, the value of the land, and any injury, which may accrue from severance.

*SECTION II.

BY SURVEYORS.

§ 103. The assessment of compensation, by surveyors, under the English statutes, is merely provisional, in most cases, as where the party is out of the kingdom, or cannot be found, two justices are required to nominate an able practical surveyor, who is, under certain solemnities, required to make a valuation of the land taken, or injuriously affected, the amount of which the com-

[1] See the subject discussed *ante*, § 202, 203.

pany are required to deposit in the bank, before proceeding with the works. And if such party be dissatisfied with the sum thus deposited, he may, before applying to chancery for the money, require the question to be submitted to arbitration, as in other cases of disputed compensation. Surveyors are required to assess damages for severance of land, the same as justices of the peace.[1]

SECTION III.

BY ARBITRATION.

§ 104. By the English statutes, if the amount of compensation claimed exceed the jurisdiction of two justices, any party claiming compensation, may compel an arbitration, by taking the requisite steps in due time. Unless both parties concur in the same arbitrator, each party, upon the request of the other, is required to name one. The appointment of the arbitrator is to be under the hand of the party, and delivered to the arbitrator, and is to be deemed a submission, by such party. Such submission is irrevocable, even by the death of the party.

If either party neglect, for fourteen days, after request by the other party, to name an arbitrator, one may be named, by the other party, who shall decide the controversy. If either party name an arbitrator, who is incompetent, the other party must retire from the arbitration, or he will be bound by his acquiescence.[1] The secretary of a railway company, by the English statutes, would seem to *have power to bind the company, by signing the submission, whether the arbitration is compulsory, or not.[2]

It was held that the appointment of an arbitrator, or referee, implied the notification of such appointment, to the other party, within the time limited in the submission, or the doings of such referee were void.[3] And not only so, but the notice must be explicit. It is not sufficient to say, "Take notice, that it is *my*

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[1] Hodges on Railways, 250, 251, 252.

[1] *In re* Eliott, 2 DeG. & Sm. 17.

[2] Collins *v.* South Staffordshire Railway Co. 21 Law J. (Ex.) 247; 12 Eng. L. & Eq. R. 565.

[3] Tew *v.* Harris, 11 Q. B. 7.

intention to nominate S. M.," notwithstanding it was added, "if the company failed to appoint. I the said T. B. will appoint S. M. to act on behalf of both parties."[4] And in this case it is said, it would seem that the appointment, by the claimant, of an arbitrator to act for both parties, is not valid, unless he has previously appointed an arbitrator, on his part, and notified such appointment to the company. There should be two separate appointments, although it may be of the same person, it is here suggested.[5]

The arbitrator has no power beyond the awarding of a pecuniary compensation, for the land taken by the company, and cannot direct what right of way shall remain in the tenant, to the portion of land not taken.[6] Nor can he apportion the rent to the tenant.[6]

If the land-owner gives no notice of claim, in reply to the notice to treat, the company may treat it as a case of disputed compensation.[7] If the compensation claimed be less than 50*l.*, it may be settled by two justices. But if more than 50*l.* be claimed, or offered, and the claimant desire to have it settled by arbitration, it is at his option, and he must give notice of such desire, before the company issue their warrant to the sheriff to summon a jury, to assess the compensation, which they may do, in ten days, after giving the claimant notice, that they shall do so, unless in the mean time he elect to have the matter settled by arbitration.[7]

* And under the Massachusetts statute, giving railways the right to alter highways, upon giving notice to the selectmen of the towns, where such highways are situated, and conforming to their requirements, or the decision of the county commissioners,

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[4] Bradley *v.* London & N. W. Railway Co. 5 Exch. R. 769.

[5] But where both parties petition for a jury to revise the damages, one warrant is sufficient. Davidson *v.* Boston & Maine Railway, 3 Cush. 91. And if two warrants are issued, the sheriff should execute, and return them, as one. Id. And where there are several applications, which by statute are to be determined by one jury, the proper mode is to issue but one warrant to the sheriff, but if several warrants issue irregularly, yet if the officer summon a single jury, who hear and determine each case, their verdicts will not be set aside, for such irregularity. Wyman *v.* Lexington & West Cambridge Railway, 13 Met. 316.

[6] Ware *v.* Regent's Canal Co. 25 Eng. L. & Eq. R. 444.

[7] 8 & 9 Vict. ch. 18, § 21, 22, 23, 38.

in regard to the alteration of the highway, it was held, that if the selectmen give no notice, to the company, as to what alterations they require, the presumption is, that they require none, but leave the whole matter to the company.

And to entitle adjoining land-owners to recover damages of the railway under the statute of Massachusetts, it is not necessary, that the selectmen should have acted in the premises. The remedy in such case is not, by an action against the town, but by proceedings under the statute against the company.[8]

In such case the company are estopped to deny, that the construction of their road, as in fact made, was done, by their servants, in compliance with the requirements of the charter.[8] And embankments made, by them, for the purpose of carrying a highway over the railway, are to be regarded as a part of the railway.[8]

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*APPENDIX C.

NOTES OF LATER CASES.[1]

CORPORATION.

Records evidence.

The records of a corporation are the regular evidence of its doings. Hudson *v.* Carman, 41 Maine R. 84. But if books have not been kept, or have been lost, or destroyed, or are not accessible to the party, doubtless an acceptance of the charter may be proved by implication, from its acts, if such acts are capable of proof. Per *Tenny*, Ch. J. ib. citing Coffin *v.* Collins, 17 Maine, 440.

The records of the corporation are competent and sufficient evidence who are the corporators, and of the number of shares held by each. Penobscot Railw. *v.* White, 41 Maine R. 512.

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[8] Parker *v.* Boston & Maine Railway, 3 Cush. R. 107.

[1] The following cases have come to hand since the present edition was put to press.

Effect of judgment against the corporation, in actions against stockholders.

Such judgment is not in general evidence, in suits against stockholders, upon the same liability, [unless perhaps when the stockholders are made liable expressly upon the ground of the creditor failing to obtain payment of the company, and then only of that fact, and perhaps the amount of the claim. But in all cases of this kind, the judgment is permitted to be proved, in the action against the stockholders.] Hudson *v.* Carman, 41 Maine R. 84.

Acts of corporate officers.

Corporations are not in general responsible for the unlawful or unauthorized acts of their officers. Mitchell *v.* Rockland, 41 Maine R. 363.

Where the charter requires notice to be given, by the persons named in the act, of the time and place of opening the books for subscription to the capital stock, such notice may be given by a majority of such persons. Penobscot Railw. *v.* White, 41 Maine R. 512.

Capital stock.

Subscribers to the capital stock are regarded as members of the corporation, after its organization. Ib.

Power to contract.

The powers of corporations are conferred exclusively by their charters. But it is the duty of courts to give them such a construction, as to effect the leading purposes of the grant, where that can be done consistently with the language used. Straus *v.* Eagle Insurance Co. 5 Ohio St. 59.

But unless expressly restrained by its charter, business corporations have the power to make such contracts, and in such forms, as are requisite to accomplish the purposes of the grant. Ib.

Promissory notes, or bills, made or received by said corporations, are *primâ facie* valid. But it is competent to show that the transactions out of which they arise, are not within the powers of the corporation, and thus to defeat their operation. Ib.

LIABILITY OF SUBSCRIBERS TO CAPITAL STOCK. CALLS.

In an action by a railway company to recover for calls upon subscriptions to the capital stock, it is not necessary for the company to show compliance with the provision of its charter requiring the company not to begin its construction, until a certain proportion of the estimated cost shall have been subscribed by responsible persons. Ib.

The right to make calls, upon subscriptions to the capital stock, does not depend upon the extent, or nature, of the indebtedness of the company, nor can such questions properly be raised, in an action to recover such calls. Ib.

In such actions it is not competent for a person who subscribed, before the organization of the company, upon condition, that not less than the least sum required by the charter should be subscribed, to show that the shares were subscribed for, by persons of no actual or reputed pecuniary responsibility. But he may show that such subscriptions were not made, or taken in good faith. Ib.

But this cannot be shown by the declarations of subscribers, made long after entering into such subscriptions, and after the organization of the company; because they have no legal tendency to show, either the bad faith of the subscriber, in entering into the subscription, or of the company, in accepting it. Ib.

Where the charter of a corporation requires, that one thousand shares of the capital stock shall be subscribed before the organization of the company takes place, the decision of the majority of the subscribers, that this condition has been complied with, and the actual organization of the company, in pursuance of such determination, must be regarded as binding upon the minority; and cannot subsequently be inquired into, ib.; [unless perhaps, as stated in the body of the work, where the proceedings of the majority attending the meeting, at which the organization is effected, are in bad faith; and in such cases, the minority must take proceedings immediately or they will be bound by the organization.]

It is not competent for a defendant, who is resisting a call, but who in fact signed the paper calling the meeting of the directors, and attended the meeting, at which such calls were made, to give evidence of the motives from, or the circumstances, under which he did such acts, such acts not affecting the legality of the calls so made. Ib.

A verbal promise made by the agent of a railway company to induce subscriptions to the capital stock, and which has that effect, that payment should be delayed, a longer time than that named in the charter, is not binding upon the company. First, Because the written contract cannot be varied by a contemporaneous parol agreement; and Second, The promise being inconsistent with the charter is void, for want of power in the corporation to make it. Thigpew *v.* Miss. Central Railw. 32 Miss. R. 348. The membership in the corporation, acquired by each subscriber to the capital stock of a railway company, is a sufficient consideration for the contract of subscription. Ib.

Where the charter of a railway company requires of each subscriber to the capital stock, the payment of a certain proportion of the subscription, at the time of entering into the contract, this condition must be complied with or the contract of subscription will not be valid. Fiser *v.* Miss. & Tenn. Railw. 32 Miss. R. 359, citing 5 Sm. & Mar. 537, 13 id. 538. But if such payment be made subsequent to the subscription, but before any calls have been made, it will be regarded as a ratification of the subscription, and will thereafter become binding. Ib.

An averment in the declaration, in an action for calls, that the subscription was made "according to the statute incorporating the company," will, upon general demurrer, be held to import, that the subscriber had complied with all the requirements of the charter, to the validity of such subscription. Ib. So too if the payment of the sum required at the time of subscription be made anterior to that time, it will be held sufficient. Barrington *v.* Miss. Central Railw. 32 Miss. R. 763.

Where, by charter, a railway company have power to collect subscriptions to its capital stock, by such instalments, as the president and directors shall deem proper, they may make contracts with subscribers, for the payment of subscriptions, in any reasonable instalments, as to time and amount. And if such condition were *ultra vires*, it would render the whole contract void, and not merely the condition. Roberts *v.* Mobile & Ohio Railw. 32 Miss. R. 373.

Amendments of the charter, releasing subscribers.

Where the original charter of a railway company defined the route of its road through a certain town, and one, who resided upon the route, subscribed for shares in the capital stock, upon the representation of the president, that the road should be located according to the charter; and afterwards, at the instance of the corporation, the legislature so amended the charter, as to remove all restrictions in regard to the route, and thereupon the company abandoned the original route, and located the road materially different, and against the interest and consent of such subscriber, it was held: First, That the location of the road on the route prescribed in the original charter, and on which the defendant resided, was, under the circumstances, a consideration [and the prevailing consideration] for his subscription to the stock of the company. Second, That the amendment of the charter was material and fundamental; and not binding upon dissenting stockholders, who had subscribed for stock, under the circumstances above stated. Third, That by the facts in this case the subscribers situated, as above detailed, were released from their subscriptions. Hester *v.* Memphis and Charleston Railw. 32 Miss. R. 378.

Where one subscribed for shares in the capital stock of a railway company, it is not competent, in defence of calls on such subscription, to show by oral testimony, that he made such subscription on a condition as to the location of the road, which had not been complied with. North Carolina Railw. *v.* Leach, 4 Jones, 340. One of the commissioners, there being five, has no authority to give any assurance to subscribers, as to the route which shall be adopted by the company in the location of their road. Ib. A subscriber who seeks to avoid his subscription to the stock of a railway company, on the ground that one terminus of the road has been materially altered from that designated in the charter, must show that the alteration was made without his concurrence. Ib. And whether even his dissent, inasmuch as he might have prevented it by injunction, or mandamus, will avail in defence of his subscription, *quære?*

It is no sufficient defence to an action for calls upon a cash subscription, that the company had subsequently to the defendant's subscription, taken a large land subscription, at enormous prices. Hornaday *v.* Indiana & Illinois Central Railw. 9 Ind. R. 263.

EMINENT DOMAIN.

Where the charter of the company authorized them to take land, so much as might be necessary for their use, and also to take, for certain purposes, earth, gravel, stone, timber, or other materials, on or from the land *so taken;* it was held, that the company were not thereby empowered to take materials, from land not taken. Parsons *v.* Howe, 41 Maine R. 218.

Private way, by oral license.

It was held that it was not competent for the owner of the land, in such case, either to obstruct such way, or give permission to any other one to do so, till he had revoked the license. And therefore where the owner of such way had sustained an injury in consequence of some one placing building materials in it, by permission of the owner of the land, it was held a good cause of action against the person so placing them there. Corby *v.* Hill, 31 Law Times, 181.

Title of railway company to land condemned for their use.

This subject is extensively discussed in the case of Astley *v.* The Man. Sh. & Lin. Railw. 31 Law Times, 188, and the conclusion arrived at that the company are owners, except so far as restrained by statutes. But this rule will not apply in this country.

In North Carolina only such damages as are peculiar to the owner of the land taken by a railway company are to be taken into account, in estimating damages for land taken. Those which are common to all the land in the vicinity are not to be considered. Freedle *v.* North Carolina Railw. 4 Jones, 89. The statute remedy is exclusive of all others. McCormack *v.* Terre Haute & Richmond Railw. 9 Ind. R. 283.

The common council of a city have no power to grant permission to a railway company, to take or injure the property of a citizen. Portzman *v.* The Ind. & Cin. Railw. 9 Ind. R. 467. Such companies have implied authority to make such side-tracks and continuations, at the termini of their road, as may be reasonable and necessary for the transaction of their business and the accommodation of the public, and may take private property for these purposes. Ib. The right to use and enjoy the street is an appurtenance to the adjoining land, and an injury to the appurtenance is an injury to the whole property. Ib. For such an injury the land-owner cannot pursue the statutory remedy, but must sue for consequential damages. Ib. S. P. Evansville & Crawfordville Railw. *v.* Dick, id. 433. It was further held, that the continuation of the track of the Indianapolis and Cincinnati Railway two hundred rods beyond the depot, in the town of Lawrenceburgh, was not an unreasonable extension. Ib. This seems to have been more a question of fact than of law.

Damages for right of way.

In Ohio, in C. P. & Ind. Railw. *v.* Simpson, 5 Ohio St. R. 251, it is held that the benefits resulting to the land-owner, from the construction of the road, are to be deducted in estimating damages for land taken by a railway company, under their charter. A statute making provision for such mode of estimation is not unconstitutional. Ib. By the constitution of this state, compensation to the land-owner for land taken for public use, is to be made *in money.*

The damage caused by severance of land in a particular mode, is to be taken into account in estimating damages to the owner whose land is taken by a railway company. C. C. & B. Railw. *v.* Ball, ib. 569. Although general resulting benefits to the land-owner, in common with that occurring to other land-owners in the vicinity, is not to be taken into account, in estimating damages for land appropriated to the use of a railway; yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with a local incidental injury to such residue of land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land. Ib. But whether, if such benefit is no way connected with the injury, it can be properly considered in estimating the damages done to the land-owner. *Quære?* ib. If the party attend the inquest, he cannot object that the statute does not require notice to the land-owner. Kramer *v.* Cleveland & Pittsb. Railw. 5 Ohio St. R. 140.

Opinion of Witnesses.

The opinion of witnesses, in regard to the extent of damages which a land-owner will sustain, by the appropriation of a part of his land for the construction of a railway over it, is not admissible. Cleveland & Pittsburgh Railw. *v.* Ball, 5 Ohio St. R. 568, citing Great Western Railw. *v.* Campbell, 4 Ohio St. R. 583. But he may express his opinion of the value of the land. Ib.

CONTRACTS FOR CONSTRUCTION.

Clause referring all questions to arbitrator.

In Scott *v.* The Corporation of Liverpool, 31 Law Times, 147, it was recently decided by Vice-Chancellor *Stuart:* That where in a building contract, the corporation reserved the power to determine the contract, which they exercised; and it was also agreed, "that any dispute, or difference which might arise between the contracting parties, should be referred to and settled by the engineer; that it should not be competent for either party, to except at law or equity to his determination; and that without the certificate of the engineer no money should be paid to the plaintiffs:" it appearing, that the engineer had never refused to discharge his duty according to the contract, and had nothing to disqualify him to act, and was ready and willing to proceed and determine all matters at issue between the parties; that there was no ground for the equitable interference of the court.

Damages for breach of contract.

In a very recent case, before the Queen's Bench, Randall *v.* Roper, 31 Law Times, 81, (April, 1858,) the subject of damages, for breach of contract, arose in a somewhat novel form. The defendant sold to the plaintiff, a spurious article warranted as "chevalier seed barley;" the plaintiff resold to others on similar warranty; the seed was sown and very inferior crops grown. The sub-purchasers made claims on plaintiff for damages, for breach of warranty, but brought no actions, nor had the plaintiff paid them any thing, at the time of trial.

Held nevertheless, that the plaintiff could recover from the defendant such sum as the jury might think proper, for the damages to which the plaintiff was liable to the sub-purchasers. This seems to us a somewhat more reasonable rule of damages, than was adopted recently by the English courts, in regard to the non-arrival of passenger trains in time. *Ante*, § 154, n. 2, pp. 342, 343.

But where one contracted to furnish a fire box for a threshing machine, and ordered it, at defendant's shop, and when furnished and put to use it proved defective, and plaintiff was compelled to pay £25 as damages, it was held he could not recover it of the manufacturer, that not being in the probable contemplation of the parties at the time of the contract. Portman *v.* Nichol, 31 Law Times, 152.

COMMON CARRIERS.

Felony of servants.

Where a box carried by a railway company was delivered to plaintiff, in such a condition, as to show that the lock had been picked and it appeared that a box

of jewels had been abstracted, it was held no evidence tending to show the felony of the company's servants, as the cause of the loss. It is not enough to show facts, consistent with a felony having been committed by the company's servants, but something must be shown, inconsistent with the felony having been committed by any one else. Metcalfe *v.* London & Brighton, &c. Railw. 31 Law Times, 165.

Common carriers are liable for damage accruing to goods, after being laden upon their ship, and before commencing the transportation; even where the insurers take possession, and do not allow the carriers to complete the transportation, the goods not being in proper condition for such transportation.

The rule of damages in such case is the diminution of the value of the goods, at the place where they were damaged, and the cost of rescuing them, in the nature of salvage. The recovery may be had by the insurers, in their own name. Rogers *v.* West, 9 Ind. R. 400.

Right of plaintiffs to sue jointly.

The box, (containing jewelry,) belonged to one of the plaintiffs, but the jewelry was their joint property. It was delivered to the defendants by a servant under instruction from both plaintiffs, but was addressed to one of the plaintiffs only at a specified place. The box never reached its destination. The action was brought by the plaintiffs jointly to recover the value of the property lost. Held that there was evidence of a joint contract by the two plaintiffs with the company, and that the action was well brought by the two jointly. John & George Metcalfe *v.* The London, Brighton & So. Coast R. 31 Law Times, 166.

Search warrant.

The freight depot of a railway is not exempt from the operation of a search warrant, issued for the purpose of finding intoxicating liquors, kept for sale, contrary to the provisions of the general statute of the state. Nor is it necessary such warrant should be executed during the usual business hours, when such depot is kept open, for receiving and delivering goods; or that the officer, executing the warrant, should ask permission of the person, keeping the depot, to enter and search it. Androscoggin Railw. *v.* Richards, 41 Maine, R. 233.

Usage.

Evidence of the prevailing usage, among manufacturers, dealers, and carriers, may be resorted to, for the purpose of determining, whether sawed marble, in slabs, is to be rated as unwrought marble. Bancroft *v.* Peters, 4 Mich. R. 619.

Damages for injury to passengers, where death ensues.

A son of the plaintiff was killed, while a passenger on defendants trains. He was in the habit of occasionally visiting his parents, who were in poor circumstances, and making them presents, from which they derived considerable benefit. In an action by the plaintiff, as executor, the jury gave £120 damages. This was made up partly of loss occasioned to the plaintiff by the death of his son, and partly of the expenses of funeral, and mourning. Held, that legal liability alone is not a test of injury in respect of which damages may be recovered in

such cases, but that a reasonable expectation of pecuniary advantage, by the relatives remaining alive, may be taken into the account. But the expenses of the funeral, and of mourning, cannot be considered. Dalton *v.* Southeastern Railw. 31 Law Times, 152. And in another case, Franklin *v.* The same company, 31 Law Times, 154, (May, 1858,) it was determined, that damages are not to be given, as a solatium, or in respect of the loss of a legal right, but in respect of a reasonable expectation of a pecuniary benefit, either of a right or otherwise, from the continuance of the life. It is not necessary that actual benefit should have been derived; reasonable expectation of sensible and practical pecuniary benefit is sufficient.

Stoppage in Transitu.

It seems to be a settled principle in the law of common carriers, that the right of an unpaid vendor to stop *in transitu*, is not defeated by the goods, in the course of the transit, coming into the hands and control of a particular person named by the vendee, as his agent, for the purpose of receiving and forwarding the goods. Carfeen *v.* Campbell, Penn. Sup. Ct. May, 1858, 6 Law Reg. 561, citing Dixon *v.* Baldwin, 5 East R. 175; Covell *v.* Hitchcock, 23 Wendell, 611; Hayes *v.* Moville, 2 Harris, 48.

FIRES.

In the case of Vaughn *v.* The Taff Vale Railway, tried in the Court of Exchequer, in April, 1858, before Mr. Justice *Bramwell*, it appeared that the plaintiff's wood was set on fire by sparks from the defendants' engines, passing along the line of their railway. The wood contained grass, &c. of a very inflammable nature. There was no evidence how the mischief actually did occur. Evidence was given that the defendants had taken every possible precaution against sparks or fire of any sort escaping at all; "the defendants certainly were not guilty of negligence," it is stated in the report. The learned judge told the jury, "that if the fire was occasioned, by fire from the engine on the line of the railway, the defendants were liable." This seems to be going further than any just principle will warrant. If the defendants show themselves guilty of no negligence, they are not liable, upon any just principle, unless their business is regarded as unlawful. A rule *nisi* was obtained, for a new trial.

FENCES.

In the case of Vicksburgh & Jackson Railw. *v.* Patton, 31 Miss. R. 156, it was decided, that in that state, the owner of cattle and horses and other domestic animals, which are not of a dangerous character, may lawfully permit them to range at large on uninclosed commons; and if, in so doing, they wander upon the premises of another not inclosed by a lawful fence, he is not liable for the trespass, and they cannot be distrained *damage feasant*.

The owner of uninclosed land may prosecute his lawful business thereon, but in so doing he must exercise reasonable care and diligence to avoid injuring the cattle of others, which may have wandered on the premises. Ib.

A railway company has the exclusive right to the use and possession and enjoyment of the land upon which their track is located, and they may run their

engines and cars on the same at whatever time and with whatever speed they see proper, and not inconsistent with the safety of the persons and property committed to their charge; but this right over the land is no higher nor more extensive than that of its original owner; and hence if their track be uninclosed, they must run their engines and cars with reasonable care and prudence, so as to avoid injury to cattle which may be depasturing on the track; and if they fail to do so, they will be liable for the injury done. Ib.

A railway company is bound by law to keep their road and machinery in good order, and to have a sufficient number of faithful and trustworthy employees to manage and control the running of their engines and cars; and if, by their failure in any of these respects, the cattle of another depasturing on their uninclosed track be injured or destroyed, they will be responsible to the owner in damages. Ib.

Though there be negligence or fault on the part of the plaintiff, remotely connected with the injury, yet if the defendants' fault or negligence was the immediate and proximate cause of the injury, the plaintiff may maintain his action for damages. Ib.

It is competent for a plaintiff, on the trial of an action against a railway company for damages done by them to his property by the negligent and careless running of their engine and cars, to introduce evidence to show that the general character of the engineer in charge of the train when the injury was done, was that of a reckless and untrustworthy agent. Ib. *Quere?*

The jury may allow exemplary damages against a railway company, if it appear that the property was destroyed or injured by the gross negligence or wilful and wanton mischief of its agents. Ib.

DOMESTIC ANIMALS.

The killing a cow, or other domestic animal, on a railway, by the company's trains, is not *primâ facie* evidence of negligence. Scott *v.* Wilmington & Raleigh Railw. 4 Jones 432. A distinction is here taken, by the court, between injuries to permanent property along the line of a railway, as by fires communicated by the company's engines, and damage to animals, which are constantly changing location. In the former case, as for a space of time, no damage accrued, the occurrence of injury raises a presumption of some new cause, which may more justly be imputed to the management of company's trains, unless repelled by evidence. See also to same effect Ind. & Cin. Railw. *v.* Caldwell, 9 Ind. R. 397.

AGENTS OF RAILWAY COMPANIES.

A conductor is to be regarded as a "special agent" of the railway company, within the statute of the state of Indiana, allowing the service of process upon such agents. New Albany & Salem Railw. *v.* Grooms, 9 Ind. 243.

It was recently, (April, 1858,) held by the Queen's Bench, in Whitfield *v.* Southeastern Railw. 31 Law Times, 113, that an action for libel will lie against a railway company, where malice in law may be implied from the publication. The plaintiffs were a banking establishment, having houses, at different points, in the counties traversed by defendants' railway. The defendants were the owners, and by their agents, managed the electric telegraph along the line of their rail-

way. The libel consisted in a dispatch, sent across the wires, to the effect, that plaintiffs' bank "had stopped payment."

Mode of executing contracts by corporations.

In the case of Hamilton *v.* Newcastle & Danville Railw. 9 Ind. Rep. 359, it was held, that *primâ facie* the company had power to execute promissory notes for its legal indebtedness; that it could do this only by its agents; that no written or sealed authority to the agent was necessary to be shown; that where the charter of a corporation contains no express provision to that effect, it is not requisite that its acts should be under seal; that if it was the valid note of the corporation, no averment of consideration was necessary; if the note be in the name of the company, and signed by the president, as an officer of the company, this is sufficient to bind them.

A bill of exchange drawn by a railway company upon its secretary, is in effect a promissory note, but must be presented for payment, but not for the purpose of entitling the party to interest, if given for a debt which bore interest. M. & M. Railw. *v.* Hodge, 9 Ind. Rep. 163.

Fraud by directors of company.

One who claimed to have been induced to buy shares in a mining company, by the false representations of the directors, after four or five years, during which time the mine had been worked, and the concern proved worthless, brought his action, for money had and received, against the directors, and it was held by the Court of Queen's Bench, that he could not recover, on the ground of delay and acquiescence. Clarke *v.* Dickson, 31 Law Times, 97.

EQUITY JURISDICTION.

A bill in equity is the appropriate remedy, where, in the case of a public incorporated company, the old board of trustees refuse to surrender the control of the corporation, to the new board, duly constituted. The writ of *quo warranto* tries the rights only, and gives no relief for breach of trust; [nor will it induct the rightful board.] This can only properly be done in equity [or by writ of mandamus]. Dart *v.* Houston, 22 Ga. 506.

Specific performance in equity.

The English courts refuse any decree for specific performance against a party, who has not the power to perform the decree. As where the managing director of a company agreed with a contractor, that if he would accept part of the price of his work in preference shares, the company should accept of such shares in payment of future calls upon the shares; but the company declined to do so, on the ground of the invalidity of the contract: It was held that the proper remedy was an action for damages against the director. Ellis *v.* Colman, 31 Law Times, 144.

TAXATION.

By the charter of the Michigan Southern Railway, it was subject to a specific tax upon all sums of capital stock paid in: and upon all loans made to the

company for purposes of construction and equipment. It was held: That this included $300,000 of the stock of the company, which they allowed, as a "bonus" or "dividend" to the original purchasers of the road, no part of which was ever "paid in," though standing on the books, as a part of the capital stock: That it included the discount made in the sale of the bonds of the company for construction: And that it also included the amount of the bonds of the company issued and exchanged for the bonds of another railway company, which latter were still on hand undisposed of.

Municipal subscription for stock.

The city council of Aurora were by their charter empowered "to take stock in any incorporated company for *making roads to said city.*" The city council subscribed the limited amount, $50,000, in the capital stock of the Ohio and Mississippi Railway, which passes through the city of Aurora. Held: That a *railway through the city* was a *road to the city*, within the meaning of the charter. City of Aurora *v.* West, 9 Ind. R. 74. The general power of such corporations to subscribe for railway stock is here reaffirmed.

CONSTITUTIONAL QUESTIONS.

Within the last year the question of the distinction, between public and private corporations, in regard to the right of legislative control, came under consideration in Dart *v.* Houston, 22 Ga. R. 506, in the case of an incorporated academy. The corporation was endowed exclusively by the state, and the former board of trust was created, and had been enlarged, by act of the legislature.

In 1854 an act passed the legislature, requiring the appointment of a board of trustees annually, by the grand jury of the county, and that the old board, who had before filled the vacancies, occurring in their number, should surrender all authority and control, to the new board. The act was held constitutional, the corporation being a public one. Ib.

In the case of Michigan Central Railw. *v.* Michigan Southern Railw. 4 Michigan R. 361, a construction was placed upon the charter of the plaintiffs, wherein it is provided that no other road should be granted by the legislature, which should approach, within certain prescribed distances from the plaintiff's line, at two points, that this provision is not infringed by the granting of a "chain or series of railways, one of which might reach one of the prohibited points, and another of which *might reach the other point*, but only to an entire road, in itself extending to each point." The decision is dissented from, by two of the judges; and is a reversal of the decision of the chancellor, at the circuit; and, if we fully understand its scope, is a departure from some of the leading cases referred to upon this subject, in the body of this work. But as it turned upon the construction of the particular charter, it may be sound.

It has been very recently decided in Ohio, that it is competent for the legislature to authorize municipalities to levy special assessments, for the purpose of improving streets, upon real estate, peculiarly and specially benefited, and in proportion to such benefit. Hill *v.* Higdon, 5 Ohio St. R. 243.

Prescription.

Twenty years' uninterrupted possession by a private person, of land dedicated

to a city, for streets or public squares, under a claim of right, will bar the claim of the city. Cincinnati *v.* Evans, 5 Ohio St. R. 594. Same *v.* The Presbyterian Church, 8 Ohio R. 298.

RAILWAY INVESTMENTS.

An important question has been recently determined in the Court of Chancery in Maryland, in regard to priority of lien, as between mere certificates issued by a railway company, pledging the income of the road for the payment of interest, and the ultimate redemption of principal, called "Income Bonds," and a subsequent formal mortgage of the road, and its appurtenances. These certificates purported on their face to be secured by a "specific pledge of the income of the road;" and were sold under the express assurance from the directors and agents of the road, that no subsequent mortgage of the road would be executed till the final redemption of these bonds.

The bill was brought by certain holders of these bonds, on behalf of themselves and all others standing in the same relation, who might choose to come in under the bill, thus being in the nature of a creditor's bill. It was brought against the company, the Central Ohio Railway, and the agents who effected the sales of such bonds in the market, and made the representations upon which the purchases were made.

The concluding portion of the opinion is of sufficient importance to be given at length.

"The next question is, did the pledge of the income bonds form a lien in equity upon the land, &c.? If it had been given by a formal recorded deed, or by devise, the decisions in Maryland referred to, would so determine. But the case in Simons's Report is relied on for a contrary doctrine. The mere legal title to property, without any equity to sustain it, would present a different case; but where the legal and equitable estate passes, it would confer a right, which the holder of it, without special notice of a prior equity, could not be divested of. That is, however, not this case; for here it rests chiefly, if not entirely, on the notice and knowledge of the defendants, that a prior equitable lien existed by the terms of the income bonds on the very tolls and earnings of the road (which I regard as meaning the *income* of the road); in other words, the third mortgage conveyed the corpus or property, before *specifically pledged* by these very defendants and the railroad company, which they now hold and set up in derogation of the equity of the income bonds, known to them to exist, and of which they had notice, and the Garretts received and hold now for their own security the third mortgage bonds, with express notice of the equitable liens of the income bonds which they themselves had previously sold to the complainants in this suit.

"In the case of Smith *v.* Richards, 13 Peters, 36, 37, the supreme court of the United States have affirmed the doctrine that a party selling property must be presumed to know whether the representations he makes of it, are true or not. And in a court of equity, representations, founded on a mistake resulting from negligence, are binding, whatever may have been the motive of the seller, and where, as in this case, the party whose conduct and conversations have been relied on, was the agent of the railway company and himself a creditor, how much stronger the application of this decision.

"Does it make any difference in such a case, whether the conversations or representations were before or after the sale of the bonds?

"An injury, arising from the suppression of the truth, is as prejudicial as that from the assertion of falsehood, Allen *v.* Addison, 7 Wendell, 9. So that if at the time of selling the income bonds, the Messrs. Garrett knew that a third mortgage would be issued in a few months thereafter, which would practically supersede and impair the security of the income bonds, and that they, as the *agents* and *creditors* of the Central Ohio Railway, would hold the last-named bond as of a higher lien and preference over the income bonds, and to their disparagement, then how forcibly would the doctrine apply, that they were suppressing a most vital and important fact, which it was their duty to communicate, and from the concealment of which the complainants are now entitled to relief for the injury thereby occasioned; that the Messrs. Garrett must have known the purposes and policy of *their principals* (the road,) cannot be doubted, and they knew better than any one else at the time, what securities would be given to its creditors if any were to be issued, being themselves, as their answer shows, largely interested as creditors to the amount of three or four hundred thousand dollars, and holding as they now do the third mortgage bonds to a large amount, as security to themselves, over and above the income bonds also held by them, and which they doubtless have subordinated in rank to the third mortgage bonds, having a much larger amount of the third mortgage bonds to secure their whole debt without in any event being compelled to fall back on the income bonds, which they regard as inferior in priority to the third mortgage bonds which they now hold.

"On the whole, therefore, I am of opinion that the complainants are entitled to such relief as a court of chancery in such a case can give. But before indicating the nature of that relief and the form of the decree, I will refer to some of the cases relied on at the bar.

"In the case of Myatt *v.* W. Helens' Railway Company, 42 E. C. Law Reports, 715, the company, by act of parliament, was authorized to borrow money on a mortgage *of the rates and tolls* of their road, and it was held, that the mortgagee could not take the land in that case, and Lord Denman says in his opinion, that he sees no reason to suppose the legislature *intended* so inconvenient a thing as to compel the company to part with that property by which the undertaking was to be carried on.

"The case, 13 Simons's Reports, Perkins *v.* Debtford Pier Company, 281, much relied on, was on a similar special act, which authorized the borrowing of money on the tolls and rates *alone* by special mortgage and not referring to the land, &c.; but in the Maryland reported cases, see Torrence *v.* Torrence, Coakley and Wife *v.* Myer, the true rule is laid down when a devise of the rents conveys the land; also it was decided in the case of Hudson *v.* Walker & Vance, 2 Harris & Gill, 415, that the grantee of a second mortgage recorded *with notice of a prior mortgage which was not duly recorded*, is bound by the equitable rights of the first mortgagee, unless upon inquiry, he is led to believe that the incumbrance was removed, "that was as to personal property, but the principle should apply as fully in equity to real estate. (See page 341, opinion of the court; see also, 9 Gill, 315, as to notice.) And Judge Story, in his work on Equity, 2 vol. section 1231, who says, following out this doctrine: "It is a general principle in equity, that as against the party himself, or any claiming under him, voluntarily

or with notice, such as an agent, that is, under an agreement or on contracts, creating a lien on real estate or personal property, it raises a trust." Without, therefore, longer pausing to examine all the authorities, English and American, cited and to be found in the books, I am clear in regarding this case as one on the evidence, coming within the operation of that rule of equity which names an agreement or contract creating a lien, binding on the parties or party, who, with *knowledge* and *notice* of such agreement or contract, afterwards by a subsequent agreement or contract by specialty or otherwise, attempts to supersede the first contract or impair the liens arising under it; and a court of equity should give relief in such a case. I shall decree, therefore, in conformity to this opinion, and upon the fullest authorities, as I understand them, that the defendants, especially the Messrs. Garrett & Sons, who are within the direct jurisdiction of a Maryland court of chancery, shall hold the third mortgage bonds now in their hands, in trust, for the benefit of the complainants in this case, whose prior equitable lien under the income bonds, I regard as paramount, and to be preferred over the third mortgage bonds, so held by the defendants as hypothecated to them, or as agents of their co-defendants, the Central Ohio Railway Company; and that they shall also account and set forth the nature and amount of their claim against the said Central Ohio Railway Company, and further show how the same was incurred, so that a full account be rendered in the premises, and the injunction heretofore issued is therefore continued.

"It has been objected, however, that as the Central Ohio Railway Company and their property, are in the state of Ohio, no decree of this court could be made available; and that no jurisdiction can, therefore, be had of the case; from this I dissent, and indeed, it was not pressed in the argument.

"A court of chancery in Maryland, has jurisdiction over the parties defendant answering this bill, and submitting themselves to its jurisdiction, certainly over the Messrs. Garrett & Sons, the agents here of said road, whose agreements, contracts, and acts in Maryland must bind their principals, and a decree, therefore, would be of as much efficacy as if all the defendants resided in Maryland.

"It has been also objected, but not urged in the argument, that if representations were made by the Messrs. Garretts, upon which the complainants purchased the income bonds in question, they were verbal, and, not being in writing, under the statute of frauds, cannot be regarded.

"And that this being in the nature of a creditor's bill, and the Central Ohio Railway Company not being insolvent, on a prayer for distribution, this court ought not to interfere.

"I do not concur in this view, and regarding the evidence as admissible, and the rights of the parties litigant properly under the jurisdiction of a Maryland court of chancery, upon this record and case I shall so adjudge and decree.

"A decree in accordance with this opinion will be signed by me."

Negligence.

It is the duty of the judge, in jury trials, in regard to questions of negligence, to define negligence, as applicable to the state of facts, attempted to be shown, but to refer the question, where and to whom the negligence attaches, to the jury. Reeves *v.* Delaware L. & W. R. Penn. Sup. Ct. 1858, May term.

It is the general rule, in the American courts, that where both parties are in

fault, or guilty of the negligence which causes the loss, neither can recover against the other. Ib.

At the intersection of a railway and turnpike, the traveller by the highway has a right to be within the rails long enough to cross them, but he is bound to look out for trains, and must not rush heedlessly, nor remain unnecessarily on a spot where the law allows engines to be propelled. Ib.

What constitutes negligence, in any particular relation, is ordinarily a mixed question of law and fact; but what duty the law implies, as incident to any particular relation or employment, is always a question of law for the court. M. R. & L. E. Railw. *v.* Barber, 5 Ohio St. R. 567.

LIABILITY OF RAILWAYS FOR INJURY TO SERVANTS BY DEFECT OF MACHINERY.

Conductors.

In regard to their conductors and other servants and employees, a railway company cannot be regarded as in any sense guarantors of the sufficiency and safety of their machinery, but are responsible only, when injury occurs to such servants, without fault on their part, and through the neglect of the company to furnish machinery and apparatus reasonably safe, for the uses to which it is put. And in such cases, conductors, &c. may demand of the company reasonable care and diligence in procuring and keeping such machinery and apparatus, as is safe for the uses to which it is to be put; and beyond this, it is one of the hazards of his contract, that such conductor must take the risk of accidents.

But a conductor, not being under the control of any superior, in immediate and constant contact, is bound to exercise an independent and prudent forecast as to perils; and inspection of the machinery to guard against such perils, and the liability to accidents; and if he receive an injury, while neglecting such duty, or through mismanagement of his train in any particular, or through any defect or insufficiency of the machinery, of which he was previously aware, or which would have been discovered by that careful inspection which it was his duty to have made, he cannot recover of the company; nor can he recover, if the defect in the machinery causing the accident, were unknown both to the conductor and the company, and neither party was in fault.

It is the duty of the company to furnish the requisite number of hands, for the safe management of their trains; and if they do not, the conductor may legally decline to continue in the service; but if under these circumstances, he still continues to operate the train, he voluntarily assumes the risk and waives the obligation of the company in this respect to himself and can have no redress for damages so incurred. See 5 Ohio St. R. ——.

MASTER AND SERVANT.

Acts of Contractor, &c.

The employer is only responsible for injuries resulting from the negligent manner of doing work, while he retains the control and direction over the *mode* and

manner of doing it. In such cases, although the work is done by a contractor, the employer is liable for all injuries resulting from the negligence of the contractor, or his servants, or agents, the same as if they came under his own immediate control. City of Cincinnati *v.* Stone, 5 Ohio St. R. 38, *ante*, § 168, and notes.

Just as we take leave of this volume, we are informed of the decision of two important questions, by the Supreme Court of Massachusetts, in cases not yet reported, even in the Law Reporter.

1. That the Commonwealth is proprietor of flats, where the tide ebbs and flows: Commonwealth *v.* Roxbury.

2. That a railway, having leased one of its branches to another company, is still liable to an action as common carriers of goods for loss or damage on such branch road, while operated by the lessees.

These decisions, as reported to us, are in accordance with the general principles of the English and American law, as stated in the body of the work. But if the cases, when reported officially, shall be found fully to sustain these distinct propositions, of which we have no means, at present, of forming an opinion, they must be regarded as highly important, on account of the disposition manifested, in some quarters, to question the former well-established doctrines upon the subject. We had expected to be able to obtain the opinions at length, but have not been able to do so.

INDEX.

ABANDONMENT,
sale of road not equivalent to, 106.
ACCIDENT,
when inevitable, or the act of God, 232.
ACCOUNT,
ordered, after company completed work, 216.
ACTIONS,
against carriers of goods,
action for calls, 85–88.
party interested may have action, 239–245.
consignor being owner, proper party, 322.
not estopped by act of consignee, 322.
recovery by bailee bars claim of general owner, 322.
consignee being owner should sue, 322.
where death caused by negligence, 336–341.
ADMISSIONS, (See AMALGAMATION.)
what amounts to estoppel *in pais*, 86, 664.
AGENTS. (See DIRECTORS, CONTRACTORS.)
can only bind the company within their employment, 291.
may receive countermand of goods, 291.
will make no difference, if agent assume to bind company, 291, 292.
ratification of other similar contracts, evidence against company, 292.
notice of want of authority in, 292, 293.
may bind company, even if he disobeys instructions, 293.
of other companies bind carrier, 293.
liability for acts of contractors and their agents, 377–380.
liability of company for acts of, 380–385.
liberal discretion allowed, 380.
company liable for torts committed by, 380.
and for wilful act, if done in the course of his employment, 381–384.
respondeat superior, 382–384.
company may be regarded as present, and assenting, 384–386.
general, of company, extent of authority, 407, 408.
(See APPENDIX C.)
ALTERATION,
in charter,
fundamental, will release subscribers, 91.

ALTERATION,—*continued.*
not unless unlawful, 94, 96.
location of road,
if one be made, which substantially affects the consideration of subscriptions, they will be released, 95, 96.
(See CALLS, SUBSCRIPTION.)
AMALGAMATION,
power of legislature to amalgamate, 621, 622.
what amounts to.
mere association not sufficient, 622, 623.
agreement to, from day past, 623.
what contracts made before, binding.
if legal, all prior contracts may be enforced, 623.
formalities must be complied with, 623, 624.
admissions made before, binding, 624.
funds of consolidated company may be applied to debts, 624.
illustration of right to, 624.
ANIMALS. (See NEGLIGENCE, FENCES.)
APPEAL,
costs, 145.
mode of trial, 145.
(See APPENDIX C. 692–697.)
ARBITRATION,
claim for compensation for land.
attorney, without express power, may refer claim, 182.
award binding, unless objected to in court, 183.
agreements to submit, as conditions precedent to right of action, 223, 224.
of claim for land damages under English statute, 689–691.
ARRANGEMENTS OF TRAFFIC,
leases, and similar contracts, require assent of legislature, 418–422.
companies may make special contracts, 418.
but cannot transfer duty of one company to another, 418, 419.
original company liable after lease, 419.
courts of equity enjoin from leasing, 420.
but such contracts made by legislative consent, are to receive a favorable construction, 420.
contracts between different companies, regulating traffic, 435, 436.
ASSESSMENT, (See CALLS.)
ASSIGNEE,
of insolvent, not liable for debts of company, 65, 66.
ASSIGNMENTS, (See CREDITORS.)
ATTACHING CREDITORS,
of railway property.
what rights acquired, 590, 591.
(See CREDITORS.)
ATTORNEY,
power to refer claim.
may refer claim for compensation for land, without express power, 182.

AWARD, (See ARBITRATION.)
valid if substantially correct, 206.
court will not set aside where it does substantial justice, 206, 207.
agreements to obtain, before suit, 223, 224.

B.

BAGGAGE, (See COMMON CARRIERS.)
of passengers,
company liable for as common carriers, 242, 243.
checks of company evidence of receipt of, 242.
company liable for, as far as they check, 242.
and until actual delivery, 243.
but not unless given in charge of proper servants, 244.
party interested may have action, 245.
does not include merchandise, carried covertly, 312.
although passenger have no other trunk, 312.
includes jewelry, &c. 312, 313.
BANKRUPTCY,
in actions for calls,
is a valid defence, 89, 90.
BILL OF LADING,
between consignor and carrier, is *primâ facie* evidence, 307.
not as to intermediate carriers, 308.
may be explained, by oral evidence, 308, 309.
containing express promise to deliver, by day named, 309.
stipulation to deduct from freight, for delay, 309.
if full freight demanded, carrier must refund, 309.
must be forwarded according to, 309.
BONDHOLDERS. (See RAILWAY INVESTMENTS.)
BONDS, (See RAILWAY INVESTMENTS.)
of railway secured by mortgage, 564–568.
holder may enforce, 595.
issued by cities and towns, 596.
rights and remedies, 572–596.
judgment not allowed on coupons, till produced, 596.
BORROWED CAPITAL. (See RAILWAY INVESTMENTS.)
BY-LAWS,
may regulate conduct of passengers, 24.
must be reasonable, and not against law, 24.
must not be against common right, 24.
power to make may be implied, 24, 25.
but not where it is expressly given to a certain extent, 24, 25.
not required to be made in any particular form, 25.
unless so required in the charter, 25.
in England must be under the common seal, 25.
model code, framed by Board of Trade, in England, 25, 26.
company may discriminate, as to fares, paid in cars, or at stations, 26.

BY-LAWS,—*continued.*
may expel passengers from cars, for violation of rules, 27.
legislature may control this, as to existing companies, 27.
cannot refuse to be responsible for baggage, 27.
regulating the use of stations and grounds, 29, 30, 31, and notes.
statutes of corporation, 30.
rules and regulations, 31.
requiring larger fares for shorter distances, 31.
may require passengers to go through in same train, 32.
must be published, or shown to be known to party, 32, 33.
may exclude merchandise from passenger trains, 34.
requiring passengers to show ticket, 32.
where check marked "good for this trip only," 32, and note.
where passenger refuses to surrender ticket, *ib.*

C.

CALLS,
must be paid by vendor, if necessary to pass title, 46.
often matter of construction and inference, who shall pay, 47.
paid by vendor, through neglect of vendee, vendor allowed to recover of vendee, 47, 48.
upon shares included in legacy, 55, n.
made after transfer, 58–60, and notes.
when made, 63, 64.
should be made by directors, 64.
in case of death and insolvency, successor to title liable for, 65.
party upon the registry liable, 68.
bankrupts remain liable, 68.
cestuis que trust not liable, 69.
when vendee liable, 47, 48.
conditions of subscriptions must be performed, 77, 78, 79, 80, 81, and notes.
party liable for, 82–84.
may be made payable by instalments, 81.
how party may be released from, 84, 85.
defences to actions for.
informality in organization of company insufficient, 85, 86.
acquiescence estops the party, 86.
default in first payment insufficient, 86, 87.
company may waive such condition, 87, 88.
subscriber liable for, although subsequent act requires more capital, than has been subscribed, 88. (See APPENDIX C. 692–697.)
CANAL,
exclusive franchises not interfered with, by railway, unless it obstruct its use, 502.
CAPITAL STOCK, (See RAILWAY INVESTMENTS.)
must all be subscribed before organization, if required, 7.

CAPITAL STOCK,—*continued.*
colorable subscriptions, binding at law, 8.
must be distributed according to charter, 8, 9.
if limited, must be subscribed before calls made, 37, 77, 79.
cannot be reduced by the act of the corporation, 37, 38.
personal estate, 38.
shares in,
not goods, wares, or merchandise, 38, 39.
held in trust, in case of insolvency, goes to other trustees, 65.
contracts for payments in shares in.
may recover nominal value, 227.
but where recovery is on *quantum meruit*, only market value, 227.
where incumbrances are incurred subsequently, 229.
CATTLE. (See NEGLIGENCE. FENCES. TORTS. APPENDIX C. 692–697.)
CERTIORARI,
to remove proceedings against railways, 469, 470.
to bring up unfinished proceedings, or those not according to the course of common law, 469.
the remedy of universal application, 469.
where case fully heard on application, 470.
where there is an excess of jurisdiction, 470.
jurisdiction and mode of procedure, 471.
lies in case of irregularity, 471.
granting writ, matter of discretion, 471.
defects not amendable, 471.
CESTUIS QUE TRUST, (See RAILWAY INVESTMENTS.)
not liable for calls, 69.
CHANCERY JURISDICTION. (See EQUITY.)
organization of company.
ground and extent of, 8.
CHARTER. (See CONSTITUTIONAL QUESTIONS.)
acceptance of must be shown.
subscription to stock sufficient sometimes, 10.
must be done in form prescribed, 10.
may be shown by way of inference and presumption, 10, 11.
may be shown by parol, 11.
amendment of, 12, n. 13, n.
time of continuance, 13, n.
fundamental alteration of, 90–96.
subscriptions before date of, 97–99.
CHECK, (See COMMON CARRIERS. BAGGAGE.)
evidence against company, 242.
CHURCH,
use of locomotive in vicinity of, 519.
CITIES. (See MUNICIPALITIES.)
COMMERCE,
right of Congress to regulate,
may determine what erections under state grants are a nuisance, as being an obstruction to navigation, 169.

COMMISSIONERS,
to receive subscriptions and organize company,
must all act, 9.
may take securities for subscriptions, 97.
to assess land damages, § 72, 139–146.
fees, 145.
cause for setting aside report, 145.
revision by court, 145.
conditional report, debt will not lie upon, 145.
(See RAILWAY COMMISSIONERS.)
must all act, 146.
COMMON CARRIERS,
duty at common law.
who are, 232.
extent of liability, 232.
liability for parcels carried by express, 236–239.
railways are, 234–236.
liable to be sued by party in interest, 239.
rights and duties of express carriers, 239–242.
responsibility for baggage of passengers, 242–245.
when carrier's responsibility begins, 246–249.
responsibility begins upon delivery of goods, 246, 247.
delivery, at usual place of receiving goods, sufficient, 246, 247.
where goods are delivered to be carried, 247.
acceptance of goods, at unusual place, 247.
question of fact often, 247.
acceptance by proper servants, 248.
except in warehouse, 248, 249.
when carrier's responsibility terminates, 249–260.
responsible for delivery of parcels, 249.
but not of ordinary freight, 249, 250.
affected by usage, and course of business, 250, 251.
bound to keep goods reasonable time, after arrival, 252, 253.
afterwards, only liable for ordinary neglect, 254, 255, 256, 257.
excused when consignee assumes control of goods, 259.
responsibility attaches, on delivery, at usual place of receiving, 260.
general duty—equality of charges—special damage.
bound to carry, for all who apply, 261.
may demand freight in advance, 261.
not bound to receive goods which they are not accustomed to carry, 262.
or where they are not in safe condition to carry, 262.
cannot refuse to carry, because owner will not disclose contents, 263.
must carry packed parcels, if required, 263.
liable for special damage, for delay in transportation, 264.
notice restricting carrier's responsibility, effect of, 264–269.
effect of special contracts upon carrier's responsibility, 270–280.
burden of proof upon carrier, after receipt and loss shown, 274.
effect of notice, and special contracts, in regard to ordinary and extraordinary liability, 280, 281.

COMMON CARRIERS,—*continued.*
responsibility beyond their own route. English rule, 281, 282.
by American rule, not liable, unless special contract, 282, 287.
power to make such contract, 287–289.
authority of agents and servants, to bind company, 290–293.
limitation of duty, by course of business, 293–297.
cases when not liable for gross negligence, 297–300.
English Carriers' Act, 297, 298.
must give specification and pay insurance, 298, 299.
loss by felony of servants, 299.
not liable where disguise used, in packing, 299.
entitled to have explicit declaration of contents, 299, 300.
but refusal of this will not excuse for not carrying, 300.
statute does not excuse carrier for delay, 300, 301, 302.
not liable for losses by internal decay, 303.
or by bad package, 303.
right to stop *in transitu*, 303–306.
effect of bill of lading, 307–309.
to what extent party may be witness, 310–312.
extent of responsibility for baggage, 312, 313.
lien for freight, 314–317.
time of delivery of goods, 318, 319.
have an insurable interest in goods, 319.
rule of damages, 320–322.
incidents of actions against, 321, 322.
where consignor obtains advance on bill of lading, 322.
liable notwithstanding insurance to owner, 360.
(See APPENDIX C. 692–697.)
COMMON CARRIERS OF PASSENGERS, (See PASSENGER CARRIERS.)
COMPANY, (See RAILWAY INVESTMENTS.)
act, by meeting, by directors, by agents, 16.
may own other property than stock, unless restrained, 36.
cannot mortgage its franchise, etc. without consent of legislature, 36.
liable to action and writ of mandamus, for not recording transfer of shares, 62.
but not for refusing to record mortgage of shares, 63.
bound to same duty, in obtaining right of way by consent, as by deed, 105.
liable for materials accepted, and used, 227.
liable for an act prohibited, though no special damages, 626.
COMPENSATION,
for franchise taken.
whole should be taken, 129.
value should be paid, 129, 130.
for land condemned.
general inquiry, 133–135.
remote damages not to be considered, 135.
general rule of estimating, 135.
prospective to be assessed, 136.

COMPENSATION,—*continued.*
where value "in money" is required, 136.
damages and benefits cannot be considered, 136, 137.
provisions of English statute, 137.
advantages and disadvantages must be stated sometimes, 138.
when to be made, conflicting opinions, 147.
must be ready for land-owner, before land taken, 148.
rule in Civil Law, and Code Napoleon, 148.
rule in different American states, 148, 149.
cases reviewed, 149, 150.
where general law provides a different mode from charter, 679.
extent of compensation, 684, 685.
future damages under English statute, 685.
mode of estimating under English statute.
by justices, 688.
by surveyors, 689.
by arbitrators, 689–691.
for land, assessment enforced by mandamus, 456, 461.
CONDITIONS PRECEDENT,
organization of company.
must be complied with, before organization, 7.
charter location of road is sometimes, 8.
calls.
must be complied with before calls, 77.
legislature cannot repeal those affecting calls, 80.
nonpayment of sum required on subscription, 37, 38.
may be waived by parties, 37, 38, 79, 80, 87.
location of road.
must be substantially performed, 95–98.
and strictly, where so required by subscription, 95–98.
taking land.
must be complied with, 118.
must be alleged in petition, 118.
CONDITIONS SUBSEQUENT,
organization of company.
how enforced, 8.
the construction of road with care, 105.
calls.
need not be complied with, 78, 79.
CONDUCTOR,
of railway train.
rights, duties, and liabilities, 30–35, 351, 352.
CONSIGNEE, (See COMMON CARRIERS.)
must have reasonable time to remove goods, 253, 254.
where goods arrive out of time, may remove after notice, 255–257.
where misinformed as to arrival of goods, 259.
CONSOLIDATION. (See AMALGAMATION.)
CONSTITUTIONAL QUESTIONS,
right and importance of legislative control, 5.

CONSTITUTIONAL QUESTIONS,—*continued.*
when railway grants are paramount and exclusive.
no such restrictions exist in England, 537.
in the United States depend upon the Federal Constitution, 537, 538.
what is requisite to render the grant exclusive, 539.
construction of such grants, 540–548.
grants of the use of navigable waters for manufacturing, 541–543.
forfeiture for the benefit of county, 544–546.
repeal of charters, 547.
grounds upon which acts of legislation may be declared void, 547, 548, n. 13.
power of the legislature to impose restrictions upon existing corporations.
may subject them to police regulations, 549–560.
case in Maryland, 550.
extent of a reservation to repeal charter, 559.
effect of an express exemption from legislative control, 559, 560.
construction of exclusive railway grants.
construction should be strict against the company, 561.
extent of implied grants in such cases, 561, 562.
ambiguous terms construed most against company, 562.
(See APPENDIX C. 692–697.)
CONSTITUTIONAL RESTRICTIONS,
inviolability of franchises, 130.
power of state legislature over such franchises, 131.
CONSTRUCTION, (See MANDAMUS.)
line of railway, right of deviation, 186–193.
distance how measured, 193, 194.
of railway to be done with least damage.
does not extend to form of the road, but mode of construction, 195.
this will not control special provisions in act, 195.
bound to restore works interfered with, for all uses, 195.
of works, sufficient if apparently good, at time, 199.
(See APPENDIX C. 692–697.)
of charter in regard to nature of works.
review of cases upon the subject, 199.
terms of contract, money penalties, excuse for non-performance, 199–203.
form of execution, extra work, deviations, 203, 204.
where one party repudiates the contract, 205.
decisions of arbitrators, 206, 207.
engineers, 207, 209.
relief in equity, as to decisions of, 210–217.
fraud in contracts, for construction, 217–221.
engineer's estimates wanting through fault of company, 222–225.
contracts for materials and machinery, 225–227.
mechanic's lien, 231.
of charter in regard to extent of powers.
of statutes not affected by what passed between the promoters and opposers, 666.

CONSTRUCTION,—*continued.*
of statutes should be most favorable to those whose property is thereby sought to be invaded, 668.
(See CONSTITUTIONAL QUESTIONS. CONTRACTS.)
CONTRACTS, (See DIRECTORS. ARRANGEMENTS OF TRAFFIC.)
to transfer stock in future, if *bonâ fide*, are valid, 45.
vendor to have stock, at the time due, 45, 46.
to remove impediments to transfer, 45, 46.
must be prepared, by party taking initiative, 52, 53.
to release subscriptions, to capital stock, not binding, 99, 100.
for stock, to be paid in other stock, 85.
for construction.
assume unusual forms, 199.
estimates made by engineer, 199.
money penalties, liquidated damages, 199.
must show full performance, or legal excuse, 201.
not entitled to any thing for part performance, 202.
no particular form of execution required, 202.
must conform to requirements of charter, 203.
extra work must be performed according to contract, 204.
party repudiating, excuses the other, 205.
new, valid, 205.
construction of.
whether "earth" includes "hard pan," 205.
practical, binding, 208.
new, is condonation of old claims, 216.
for materials and machinery.
manufacturer not liable for latent defects, 225.
for materials as ordered, implies that the company will give the order, 225, 226.
stipulation in, may be waived, by acquiescence, 226.
to pay in the stock of company.
entitle the party to recover nominal value of stock, 227.
what is requisite to render permanent, 236,
under seal of company, *primâ facie* binding, 408, 409.
necessity and effect of being under seal, 423.
cases upon this subject reviewed, 423–429.
between different companies, in regard to traffic, 435, 436.
ultra vires and illegal, 410–415, 436, 437, 664. (See CONSTITUTIONAL QUESTIONS.)
to make erections not authorized by charter, 437.
to indemnify other companies against expense, 437.
to divide profits, 437.
companies exonerated from, by act of legislature, 437, 438.
forfeited by decree of engineer, does not forfeit former earnings, 201.
not under seal, enforced by mandamus, 462.
to quiet opposition, 664–666.
to obtain unequal favor, 410–415. (See DIVIDENDS.)

CONTRACTOR,
bound by deviation, unless he object, at the time, 189.
will be enjoined from interfering, after company terminate the contract, 222, 223.
liability of company for acts of agents and sub-agents of.
company not liable for such acts, 377, 378.
unless where contractor employed to do the very act, 378.
distinction between movable and immovable property, 378, 379.
no difference, as to mode of employment, 379.
rule stated, 379.
CORPORATIONS, (See COMPANY.)
private, 5.
not subject to legislative control, because they accept public aid, 560, pl. 6, n. 6.
public, 5.
subject to legislative control, 6, 560.
organization of, 7.
defect of organization must be plead, 9.
records of, evidence, 9.
definition of, and residence, 11, n.
majority of shareholders cannot dissolve, 12.
liable for fraud of agents, 211, 219.
duty enforced by mandamus, 445–452.
compelled to complete road, 446–453.
public duty of, enforced by mandamus, 455.
compelled to divide profits, 462, 463.
produce books, 463, 464.
perform statute obligation, 463.
restore one to corporate office, 464, 465.
CORPORATORS,
entitled to proportionate share of net profits, 603, 604.
COSTS,
in proceedings to estimate compensation to land-owners,
not allowed, unless given by statute, 144.
"costs" do not include witness fees, 144.
"costs and expenses" include witness fees, &c. 145.
commissioners' fees, 145.
on appeal, 145.
enforced by mandamus, 456.
in equity, 514.
COUNTIES, (See MUNICIPALITIES.)
COUPONS, (See RAILWAY INVESTMENTS.)
attached to railway bonds.
negotiable instruments, 595.
not recoverable unless produced, 595.
COVENANT,
in the lease of a railway.
to work efficiently, construed with reference to facilities in lessee's power, 431–435.

CREDITORS, (See ATTACHING CREDITORS.)
who have obtained judgment, may have bill in equity against subscribers 77.
dissolution of railways.
different modes of effecting, 602, 603.
shareholders not liable in general, 603.
subscribers liable for expenses if scheme abandoned, 604.
cannot exonerate themselves by contract with directors, 605.
company cannot give away effects to prejudice of, 605.
right reserved to repeal charter, 605, 606.
levy of execution upon property of company.
charter lien paramount to all others, 606.
road or tolls not subject to levy of execution, 606.
mode of obtaining under English statute, 606, 607.
execution against shareholders.
remedy by distinct action more common, 608.
may proceed in equity, 608.
payments in land, 608, 609.
assignments in contemplation of insolvency, 609.
CUSTOM, (See USAGE.)
party contracting bound by general, 51.
local, binding, if known to the parties, 51–53.
how far admissible to explain memoranda of contract, 52, 53.
delay in delivery of goods excused by, 319.

D.

DAMAGES, (See TORTS. DIRECTORS. DIVIDENDS.)
rule in regard to sale of shares, 54.
by delivery of inferior article, 56, n.
in estimating compensation to land-owners.
excessive, is ground of setting aside proceedings, 146.
consequential.
included in appraisal of compensation to land-owner, 152, 154.
blasting rock for road-bed, 152.
adjoining lands used, 153, 154.
injuries from fire, &c. 154, 155.
water flowing upon land, 154.
representations as to mode of constructing road, 154, 155.
statute may give remedy, 155, 156.
otherwise no remedy, where no land taken, 156.
by work, upon adjoining land, 157.
in contracts payable in stock.
may recover nominal value, 227.
on *quantum meruit*, only market value, 227.
where contract part payable in stock, 228, 229.
under general counts, governed by contract, 231.
common carriers.

DAMAGES,—*continued.*
for delay in transportation of goods, 234.
in actions generally, 320, 321.
passenger carriers.
where death ensues, 337–339.
where trains do not arrive in time, 342–345.
rule of damages, for injuries to passengers, 345–348.
prospective must be included, 345.
must be obvious, and not merely conjectural, 345, 346.
counsel fees not included, 346.
excessive, ground of new trial, 346.
pain and mental anguish, 346, 347.
plaintiff may give evidence of nature of his business, 347.
rests much in the discretion of jury, 347, 348.
in actions for loss of service, cannot include mental anguish, 348.
for wrongfully expelling passengers from cars, 351, 352.
exemplary, in cases of wilful injury, 396.
DAMAGES SPECIAL,
will depend upon circumstances, and whether known to both parties, 263, 343, 351, 352, 396.
DEATH, (See PASSENGER CARRIERS.)
title of shares transferred by, 65.
DEED, (See PURCHASE.)
executed blank, not valid, by English cases, 48.
otherwise in America, 49.
of land, includes use of water, as then used, 106, 107.
not explainable by parol, 107.
DEFENCES,
in actions for calls,
informality in organization insufficient, 85, 86.
default in first payment insufficient, 86, 87.
infancy, statute of limitations, bankruptcy, 89, 90.
DELIVERY,
of goods to carriers, 246–248.
by carriers.
must be in reasonable time, 318.
company not liable for delay, caused by unusual press of business, 318, 319.
or by loss of a bridge, by freshet, 319.
delay excused, by custom, and course of navigation, 319.
DEPOT, (See STATION.)
DEVIATION, (See LINE OF RAILWAY.)
in construction of railway.
right of, lost by election, 191, 192.
how measured, and what it imports, 670, n. 2.
DIRECTORS, (See MANDAMUS.)
should be elected, at general meeting, or on special notice, 17.
power may be restrained, by statutes, 17, 18.
not where charter confers it, 17.
courts will not interfere to control, 17.

DIRECTORS,—*continued.*
may be compelled to divide actual profits, 17.
but if they divide more, will become liable personally, 17.
act of directors *de facto* binds company, 18.
if company receive avails of contract, are bound by it, 18.
qualifications of.
may not be contractors, 22.
if so, office vacated, 22.
may be banker, for company, 22.
may be, by virtue of stock mortgaged, 22.
bankruptcy, and absence, do not vacate office, 22.
may be compelled to fill vacancies, in board, 22.
the proper authority to make calls, on shares, 64.
cannot use funds of company, except for purposes of the charter, 94, 101.
alone liable, for circumstantial misconduct, 100, 101.
cannot make profits for themselves, 101.
president cannot bind company to pay additional price for work done under contract, 205.
may bind company, unless restrained, 290, 291.
extent of authority, 399–401.
notice to one, if express, notice to company, 399, 400.
cannot apply to legislature for enlarged powers, 400.
requirements of charter must be strictly followed, 400.
cannot alter fundamental business of company, 400.
difficulty of defining proper limits of authority, 400–404.
when they become personally liable, 402–405.
not so liable for lawful acts, 402–404.
unless upon express undertaking, 404, 405.
liable personally, if they exceed their powers, 405.
effect of usage and course of business, 405.
liable, if contract *ultra vires*, or not in usual form, 405.
compensation for services, 406.
company not liable, unless express contract, 406.
may vote annuity, to disabled officer, 406.
records of proceedings, 21, 407.
authority to borrow money and buy goods, 407–409.
extent of authority, express or implied, 407.
presumed to assent to acts of general agent, 407, 408.
contracts under seal of company *primâ facie* binding, 408, 409.
strangers bound to take notice of want of authority, 409.
cannot subscribe for stock of other companies, 409.
may borrow money, if requisite, 409.
duty to serve interests of company, 410–415.
general duty of office defined, 410–415.
claim for secret service, and influence, 410–414.
right to dismiss employees; rule of damage, 416, 417.
how far under control of courts of equity, 489–496.
liable as trustees, 493, 494.

DIRECTORS,—*continued.*
not chargeable with fraudulent acts of members, 494.
equity will not enforce resolution of, 494, 495.
compel, to resist illegal tax, 495.
will not compel, to declare dividend, unless refusal wilful, 495.
DIRECTORS' MEETINGS,
all must be notified, 19.
majority must attend, 19.
board need not be full, 20.
usurpations tried by shareholders, or *quo warranto*, 20.
usage excuses irregularities often, 20.
adjourned meeting, not special, 20.
decision of majority valid, 20, 21.
DISTANCE,
how measured.
affected by subject-matter, 193.
in contracts for railway construction, 194.
general rule, 194.
as to turnpike roads, 194.
DIVIDENDS,
company not obliged to pay, till indebtedness cancelled, 44.
equity will not restrain company from declaring, 490–492.
when declared and how payable.
declared only out of net earnings of company, 597.
right of shareholders to, several, joint in the fund, 597, 598.
lien upon shares extends to, 598.
surety may claim benefit of, 598.
action will not lie for, till after demand, 598.
party entitled to, where stock fraudulently transferred.
fraudulent transferree not entitled to, 598, 599.
bonâ fide purchaser is, 599–601.
owner may forfeit claim, 600, 601.
one who buys of registered owner may hold against company, 601.
review of cases, 599–601.
guaranty of, upon railway shares, 601–602.
rule of damages for breach of such contract, 601–602.
owner of preferred stock may enjoin company from making, while deficit in funds, 492. See APPENDIX C, 692–697.
DOMESTIC ANIMALS. (See FENCES.)
injuries to, 361–367.
company not liable unless bound to keep animals off their track, 361, 362.
where animals wrongfully abroad, 361, 362.
owner in fault, 362, 363.
company, liable for gross neglect, or wilful injury, 363.
or if they might have avoided the injury, 364.
required to keep gates closed, 364.
not liable for proper use of engines, 365–367.
questions of negligence, determined by jury, 365, 366.

DOMESTIC ANIMALS,—*continued.*
by court when testimony not conflicting, 366.
company, liable for remote consequence of negligence, 366.
where statutory duty neglected, 366, 367.
where made liable absolutely, requisite proof, 374.
against what animals company bound to fence, 374–376.

E.

EMINENT DOMAIN,
definition of the right, 111.
necessary for intercommunication, 111, 112.
antiquity of its recognition, 112.
limitations upon its exercise, 112, 113.
resides in the states of the Union, principally, 113.
duty of making compensation, 113, 116, 133–138.
mode of estimating, 139–146.
where to be made, 147–152.
in navigable waters, 113.
rivers, above tide-water, 113, 114.
through land owned by United States, 114, n.
legislative grant indispensable, 115, n. 117.
consequential damages, 116.
such grants strictly construed, 116.
interference of courts of equity, 117.
conditions precedent, 118–120.
preliminary surveys, 120–122.
power to take temporary possession of public and private ways, 122.
land for ordinary and extraordinary purposes, 123.
by railway in another state, 123.
title acquired by the company, 124–129
corporate franchises condemned, 129–132.
appraisal includes consequential damages, 152–155.
action for consequential damages, 155–158.
right to occupy highway, 158–164.
right to build over navigable waters, 166–169.
obstruction of streams, 170–172.
obstruction of private ways, 172, 173.
statute remedy exclusive, 173–175.
lands injuriously affected, 175–180.
different estates protected, 180–182.
arbitration, 183.
statute of limitations, 183, 184.
extent of, 132.

EMPLOYEES, (See AGENTS AND SERVANTS. DIRECTORS.)
right to dismiss.
rule of damages for dismissing, 415–417.
sometimes said they may recover salary, 415, 416.

EMPLOYEES,—*continued.*
this rule not favored, in England, 416.
American cases, 417.
term of wages, provided in contract, after dismissal, liquidated damages, 417.
statute remedy for laborers, extends to those of sub-contractor, 417.
ENGINEER, (See ESTIMATES.)
being shareholder, not valid objection to estimates, 211, 216.
duty in conducting train, 396–398.
ENTRY,
upon lands.
for preliminary surveys, 119, 120.
materials, 120, 121, 676–678.
proceedings requisite to enable company to enter upon land, 678, 679.
after verdict and before judgment, 679.
to make erections upon other lands, 686, 687.
EQUITY,
will not set aside sale of shares, based upon misapprehension of both parties, 61.
interference in regard to subscriptions for stock, 99–101.
in regard to forfeiture of shares, 102, 103.
will interfere to restrain company from taking land, before making compensation, 174.
will not enjoin the exercise of legal right, 176.
or a doubtful claim, 177.
when remedy, at law, is adequate, 177.
will not restrain company from proceeding according to charter, unless some distinct contract be shown, 191.
interfere to relieve party from expense incurred, where no definite contract has been closed, 221.
jurisdiction in regard to railways, 474.
will not assume the control of railway construction, 474.
restrain company from taking lands, by indirection, 474.
when exceeding its powers, 475.
board of surveyors from interference, 475, 476.
such board must apply to the proper tribunals, 476.
will restrain company, whose powers have ceased, 476.
enforce payment of compensation for land, 476.
injunction suspended, on assurance of payment, 476, 477.
practice must conform to change of times, 477.
review of cases upon the subject, 477–479.
injunctions to protect the rights of land-owners and the company, 478–480.
company restrained from taking less land, than notice, 478.
injunction refused where great loss will ensue, 480.
will not enjoin company, to try constitutionality of act, 480.
company enjoined from carrying passengers beyond their route, 481.
from taking land for a warehouse, and building a track to it, 481.
injunction denied to restrain company from taking land, 481.

EQUITY,—*continued.*
equitable interference in regard to the works.
these matters arranged, by stipulations, in court, 481, 482.
cases illustrating the mode of proceeding, 482–484.
where company required to do least damage, 484.
will direct the mode of crossing highways, 484, 485.
mandamus the more appropriate remedy, 485.
municipalities may maintain bill to protect highways, 485, 486.
injunctions to carry into effect orders of Railway Commissioners, 486, 487.
railway companies perform important public functions, 486, 487.
will enforce order of Railway Commissioners, without revising, 487.
equitable interference where company have not funds.
English courts will not allow company to take land, if funds fail, 487.
qualified, in later cases, 488, 489.
will not compel company to complete whole road, 489.
cases reviewed and result stated, 488, 489.
equitable control of the management of railways.
will not interfere in matters remediable by shareholders, 490.
will not restrain company from declaring dividend, 490.
will enforce public duty, rather than private, 490.
will restrain company from diverting funds to illegal use, 490–492.
will not interfere because company ceases to act, 491–493.
directors liable as trustees, 493, 494.
committee not chargeable with fraudulent acts of members, 494.
will not enforce resolutions of directors, 494, 495.
will sustain suit of minority against majority, 495.
minority may insist upon continuing business, 495.
may have bill against directors for not resisting tax, 495.
company may expend funds, in opposing proceedings in legislature, 495.
will not compel directors to declare dividend unless refusal wilful, 495.
directors liable only for good faith and diligence, 495.
applications to legislature for enlarged powers.
will not enjoin company against, 496.
English cases favor such applications, 496, 497.
proper limitations stated, 497.
specific performance.
will hold control of contracts, referring law, to the courts of law, 498.
where legal right clear, will not interfere, 498.
will not interfere, on conflicting evidence, 498.
or where company contracted to stop at refreshment station, 498.
or if there is doubt of the legality of contract, 499.
contract for use of company's track is permanent, 499.
will decree specific performance in regard to farm accommodations, 499.
restraining company from interfering with exclusive franchise.
will exercise a preventive jurisdiction in such cases, 499, 500.
will not interfere where legal right doubtful, 500.
unless, to prevent irreparable injury, &c. 500.
will restrain different companies from forming competing line, 501.

EQUITY,—*continued.*
railway not an infringement of rights of canal, 501, 502.
unless it obstruct the canal, 502.
infringement of corporate rights in nature of nuisance.
will interfere to prevent multiplicity of suits, &c. 502.
definition of this part of equity jurisdiction, 502, 503.
to preserve property pendente lite.
will not decree specific performance in question of damages, 503, 504.
parties put under terms, if injunction will operate harshly, 504.
review of cases upon the subject, 504, 505.
restraining parties from petitioning legislature.
will rarely interfere in such cases, 505, 506.
in case of insolvent companies.
will interfere to save costs and litigation, 506.
all parties interested may come in, 506.
manner of granting and enforcing ex parte injunctions.
liable to abuse, 507.
in important matters, notice should be given, 507.
dissolved upon answer denying equity, 507.
course of practice, and costs, 508, 509.
right to injunction lost by acquiescence.
to extinguish right, must have operated on other parties, 510.
not delay to learn extent of injury, 510.
definition of acquiescence, 510, 511.
injunction may be mandatory.
must be specific, 511.
is but specific performance, 512.
remedy in charter does not supersede resort to equity.
charter provisions, 512.
English statute, 512.
wilful breaches of injunction.
statement of case, 513.
opinion of vice-chancellor, 513, 514.
costs, 514.
will not interfere, where company exercising statutory powers, 682.
ESTATES,
different ones in estimating compensation to land-owners.
tenant's good will and chance of renewal, 180.
change of location of track, compensation to tenants, 180.
church property, in England, 181.
tenant cannot sue for penalty, for obstructing private way, 181.
heir entitled to such compensation, 181.
lessor and lessee, both entitled to compensation, 181.
right of way, from necessity, protected, 181.
mill owner can claim compensation for obstructing water, 182.
occupier of land entitled to compensation, 182.
tenant without power of alienation forfeits estate, by license to company, 182.

ESTIMATES,
for advances, under English practice, 207.
if agreed to be final, can only be set aside, in equity, and for partiality or mistake, 207, 208.
do not bar matters, not referred, 208.
can only be set aside in equity, 216.
proof of fraud must be very clear, 216.
conclusive as to quality, but not quantity, 216.
wanting through fault of company.
contractor may maintain bill in equity, 221.
grounds of equitable interference, 222.
stipulation requiring engineer's estimate, valid, 223.
not equivalent to a stipulation, that no action shall be brought, 224.
ESTOPPEL,
the delivery of a release as that of the company, 408.
in pais.
what amounts to, 86, 510, 511.
EVIDENCE, (See RECORDS, EXPERTS.)
oral to explain writing, 51–53.
in estimating compensation for land.
only legal can be received, as in other trials, 142.
may show what company paid for land adjoining, 142.
but not, what they had been condemned to pay, 143.
witness cannot give opinion of value, 143.
experts, 143.
of former similar dealings with same party competent, 271, 272.
in case of loss of baggage.
at common law party could not be witness, 310.
some of American courts hold otherwise, 310, 311.
cases reviewed, 310–312.
agents and servants of company competent, 311.
jury may find contents of trunk, &c. from presumption, 311, 312.
preponderating must be given, 322.
injury to passengers.
declarations of the party, in regard to, 350.
of negligence in regard to fires from company's engines, 357, 358.
of experts in regard to management of railway train, 396–398.
(See APPENDIX C. 692–697.)
EXECUTION, (See LEVY.)
EXEMPTION, (See TAXATION.)
EXPERTS, (See EVIDENCE.)
misconduct of railway operatives shown by, 396–398.
testimony of, proper to be received, as to management of train, 396, 397.
company not bound to exculpate, 397.
neither party bound to produce such testimony, 397.
but the omission to do so may require explanation, 397, 398.
as where company omit to produce employees, in their exculpation, 398.
EXPRESS CARRIERS. (See COMMON CARRIERS.)
company liable, where they allow servants to act as, 236, 237.

EXPRESS CARRIERS,—*continued.*
upon European railways, 239.
liable for not making delivery to consignee, 239, 240.
contract with local carriers may be rescinded, 241.
cannot charge in proportion to value of parcels, and restrict liability, 241.
not responsible beyond their own routes, 241.
where statute prohibits discrimination, 241, 242.
EXTRA WORK,
in performing contracts for construction,
must be done according to contract, 204.
but if company have benefit of work, are liable, 204.

F.

FARES, (See TOLLS.)
company may discriminate in regard to, 34, 35.
will be presumed to have been paid, 262.
how established, 399.
FARM ACCOMMODATIONS, (See FENCES.)
where included in appraisal, 138.
FENCES,
taken into account in estimating land damages.
must be stated in report, 139.
upon whom rests the obligation to maintain, 368–374.
by English statute, separate provision, 368.
this is enforced by mandamus, 369.
otherwise, part of the land damages, 369, 370.
land-owner not obliged to build, till expense provided for, 370.
some states hold the expense to be divided between company and land-owner, 370, 371, 372.
assessment of land damages, on condition company build, 372.
in some states owner of domestic animals not obliged to restrain them, 372, 373.
lessee of railway bound to keep up fences and farm accommodations, 373.
company bound to fence land acquired by grant, 373.
farm-crossings required where necessary, 373.
where land-owner declines them, 373.
not required for safety of servants and employees, 373, 374.
against what cattle company bound to erect, 374–376.
company bound to fence road for protection of passengers, 372, 23 Vt. R. 387.
at common law, owner bound to restrain his cattle, 374.
obligation to build only extends to cattle rightfully on land, 374, 375.
in the absence of any provision, company not bound to maintain, 375.
may agree with land-owner to build, 376.
time when they are required to be erected, 373.
FERRY, (See APPENDIX C. 692–697.)
damages by obstructing access to, 178.

FERRY,—*continued.*
as common carriers, 244, 245.
cannot transfer duties to railway company, without consent of legislature, 422.
FIRES,
communicated by company's engines, 357–360.
what is evidence of negligence, 357, 358.
company liable for, when in fault, 359.
party not precluded from recovery, by placing building in exposed situation, 359.
where property insured, insurers entitled to benefit of claim against company, 359, 360.
company may insure, 360.
(See APPENDIX C. 692–697.)
FIXTURE,
rolling stock, when considered, 590, 591.
FOREIGN CORPORATION,
the rights of, in other states, 23, 24 and notes, 123.
FORFEITURE,
of shares.
a cumulative remedy, 73, 74.
requirements of the charter and general laws, must be strictly pursued, 73, 74, 102.
if not, equity will set aside, 102.
must credit stock, at full market value, 102.
provisions of English statute, 102, 103.
FRANCHISES,
public, may be conferred on private person, 4–5.
ordinary franchises of railways, 11.
prerogative franchises.
eminent domain and taking tolls, or fare and freight, 23.
these implied in the grant of railways, 23.
corporate franchises.
may be condemned for railway, 129.
compensation must be made, 129.
railway franchise may be taken, 130.
exclusiveness of grant cannot protect, 132.
legislature cannot make inviolable, 132.
exclusive, equity will restrain company from interfering with, 499–503.
right to mortgage. (See RAILWAY INVESTMENTS.)
FRAUDS,
in obtaining subscriptions to capital stock, 70, 100, 101.
may be proved by parol, 70
equity will relieve against, 100, 101.
in contracts for construction.
by way of misrepresentation in obtaining subscriptions, 100, 101.
relievable in equity, on general principles, 217.
illustration of point, by leading case, 217–220.

FRAUDULENT PRACTICES,
of directors,
to raise price of shares, 60.
will render sales voidable, in court of equity, 60.
by declaring dividends when not earned, 61.
will subject directors to action, 61, 62. (See DIRECTORS.)
FREIGHT, (See TOLLS.)
may be demanded in advance, 261.
lien for, 314-317.

G.

GAUGE,
width of, 438, 439.
act requiring broad, does not prohibit mixed, 438.
permission to unite with other road, 438.
equity will enjoin a change, 438, 439.
contract to make, may be legalized, by subsequent statute, 439
GENERAL COUNTS,
recovery may be had upon, when contract performed, 231.
GRANT,
assent of company, to beneficial, presumed, 10.
of right of way.
company may take by, 104.
disabled parties may make, 104.
consideration, to take the place of the land, 105.
to pass railway, by consent, 105.
company bound, by conditions, in deed, 106.
grantee takes the land, with its incidents, 106, 107.
not explainable, by parol, 106, 107.
of power to take land.
must be strictly construed, 105, 115.
rule adopted in the American courts, 116, 117.
of right to build railway to place of shipping, 168.
contains necessary implications, 168.
paramount or exclusive. (See CONSTITUTIONAL QUESTIONS.)
GUARANTY OF STOCK AND BONDS,
notice of meeting for such purpose, 16, n.
how far binding and how executed, 404, 596, n.
of dividend on shares, 601–602.

H.

HIGHWAY,
right to use in constructing railway, without additional compensation.
decisions conflicting, 158.
review of cases on subject, 158, 159, 160.
land-owner entitled to compensation, 158.

HIGHWAY,—*continued.*
this is the just rule, 159, 160, 668.
but not generally entitled to damages, for alteration of highway, or laying railway, in street, 161.
legislature should require additional compensation, 161.
has been held land-owner may maintain action, 162.
review of cases, 163, 164.
mode of crossing, by railway.
English statutes require it should not be on level, 196.
or if so, that gates shall be maintained, 196.
if near station, speed to be slackened, 196.
injuries, by defects in, 391–393.
company liable for defects in streets, caused by their works, 391.
municipalities primarily liable in such cases, 391, 392.
but may recover indemnity against company, 392.
towns liable to indictment, 392.
company liable to mandamus or action, 392.
cannot alter course of highways, 196, 197.
or obstruct by trains, or otherwise, 515.
company liable to indictment for obstructing, 515, 516.
cannot build stations in, 520.
towns primarily liable for injuries, by obstructing, 191, 192.

I.

INDICTMENT,
against railway companies.
for obstructing highway, 515, 516.
company liable to, for misfeasance, 516, 517.
not liable to, for proper use of engines, 517.
jury to determine abuse of powers, 517, 518.
must produce no serious public inconvenience, 518.
conviction may be general, 518.
signals required, at road-crossings, 518, 519.
how far railways may become nuisances.
use of public streets, for railway, not nuisance, 519.
use of locomotives in vicinity of church, 519.
city government may grant railway use of streets, 519, 520.
must not unnecessarily interfere with public quiet, 520.
obstruction of navigable waters, 520.
excess of authority, 520.
building stations in highway, 520.
offences against railways.
railway tickets chattels, 521.
railway pass subject of forgery, 521, 522.
obstructing railway carriages, &c. 522.
form of, for death of person caused by negligence, 339.

INEVITABLE ACCIDENT,
definition of, 232, 233.
must come from a strictly superior power, 233.
INFANCY,
in actions for calls.
is a valid defence, if insisted upon, in time, 89, 90.
INFORMATION. (See QUO WARRANTO.)
INJUNCTION, (See EQUITY.)
general grounds of allowing, 478–485.
not granted where it will operate harshly, 504.
general rules applicable to subject, 504–509.
right to, lost by acquiescence, 510, 511.
may be mandatory, 511, 512.
INSANE PERSONS,
killed through want of care in those having custody of them, 340.
INSOLVENT COMPANIES, (See EQUITY, CREDITORS.)
INSTALMENTS, (See CALLS.)
INSURABLE INTEREST,
carriers have in goods, 319.
entitled to benefit of policy, procured by owner, 359, 360.
carrier liable, notwithstanding insurance of owner, 360.
INSURERS,
may recover of company, after paying loss to insured, 359, 360.
INTEREST,
contract to pay upon subscriptions paid, 100.
allowed against carrier by way of damages, 234.
INTERNAL DECAY,
injuries from, carrier not liable for, 303.
INTERNAL IMPROVEMENTS,
right of the states and the United States to make, 534.
INVESTMENT IN RAILWAYS. (See RAILWAY INVESTMENTS.)
extent of, in Great Britain and America, 6, n. 3.

J,

JUDGMENT,
in actions against shareholders.
against company, not evidence against shareholders, 9.
on mandamus revisable in error, 468.
JUNCTION. (See GAUGE.)
between different lines established by Railway Commissioners, 612.
JURISDICTION
of United States courts.
a railway corporation is regarded as a party, resident in the state of its creation and operation, 625.
it makes no difference where the corporators reside, 625.
all suits against the company must be brought in the district where it exists, 625, 626.

JURY, (See EVIDENCE, EXPERTS, NEGLIGENCE.)
cases proper to be tried by, in courts of common law, 145.
may find specially, 141.
competency of juror, 145.
may find contents of trunk, &c. from presumption, 311.
may determine question of negligence, where there is any conflict in evidence, 333, 365, 366.
try facts in return to writ of mandamus, 455, 456.

L.

LABORERS. (See EMPLOYEES.)
LANDS. (See EQUITY COMPENSATION.)
may be taken for building railway.
legislative grant requisite, 114, 115.
compensation must be made, 115.
limitation of the power to take, 116.
interference of courts of equity in regard to, 116.
rights, acquired by the company, 117.
limited to the grant, 117.
for what purpose company may enter upon, 119–125.
for extraordinary purposes company may take, 122, 123.
for what use, may be taken, 125.
reverts to owner, 127, 128.
injuriously affected.
obstruction of way, loss of custom, 175.
cutting off wharf, 176.
but not crossing of highway, near dwelling, 176.
in England statute only extends to damage done by erecting works, and not to the use of them, 176.
unforeseen at time of appraisal in England, 177.
remote injuries not within the statute, 178.
extent of Massachusetts' statute, 178, 179.
grant to take land for road, extent of, 192, 193.
remedy under English statute, 680.
LAND-OWNER. (See COMPENSATION.)
may traverse right of railway to take land, or to change route, 183, 184.
contract with, against public security, will not be enforced in equity, 190.
remedies by, under English statute.
bound to purchase the whole of a house, &c. 667, 668.
company compellable to take intersected land, 669.
effect of notice to treat, 669, 670.
requisites of the notice to treat, 671, 672.
the notice may be waived by adverse party, 672.
title of, must be distinctly stated, in reply to notice to treat, 673.
lands in possession of receiver, or committee of lunatic, 673.
fee-simple in possession, 673, 674.
different interests in land must be purchased, 674.

LAND-OWNER,—*continued.*
claim must be of same extent, as notice to treat, 675.
onus of carrying forward proceedings, 680, 681.
LEASE. (See LESSEE.)
LEGATEE
of shares.
entitled to election, interest, and new shares, 66.
will take shares, owned by testator, at date of will, although converted into consolidated stock, 66.
but not subsequently acquired, consolidated stock, 66.
LEGISLATIVE SUPERVISION,
benefits and necessity of, 614.
English statute in regard to traffic, 614, 615.
control of gauge; right of public to use road, 615.
regulation of the mode of running by municipal authority, 615–618.
carrying mails, troops, and munitions of war.
this controlled by legislation, in England, 619.
difficulties in the way of such a control here, 619.
state and federal legislatures may control, 619.
mail agents may sue company, for injuries, 619, 620.
LESSEES, (See ARRANGEMENTS OF TRAFFIC.)
of railways.
duty in regard to passengers, 424–431.
liable for their own acts, and many acts of the lessors, 434, 435.
LEVY,
upon property of company, 606.
of execution against shareholders, 606-609.
LICENSE,
to build railway, extent of, 105.
not revocable, in equity, when executed, 106.
LIEN, (See TRANSFER.)
upon shares, for indebtedness of owner, may be created, 44.
such lien not implied, 44.
for calls, is valid, 47.
in favor of laborers.
cannot be enforced without destroying works, 231.
for freight.
damage to goods may be deducted, 314, 315.
where freight paid, in advance, no lien, 315.
wrongdoer cannot create lien, for freight, 315, 316.
does not extend to general balance of account, 317.
may be waived, 317.
delivery of goods, obtained by fraud, will not defeat, 317.
attaches, in favor of last carrier, for whole freight, 317.
goods cannot be sold, at law, to satisfy, 317.
created by mortgage of railway, 573, 574.

LIMITATIONS, (See TORTS.)
claim for compensation for land.
general limitation of actions will bar this claim, 183.
filing petition, not sufficient to save bar, 183.
accruing of action, 396.
admissions of corporators, or president, not sufficient to remove bar, 396.
LINE OF RAILWAY,
manner of defining, in English charters, 186, 670, 671.
between two towns, construction of, 192.
through certain towns, does not require the order, named in charter, to be preserved, 193.
limited by town, imports its present extent, 193.

M.

MAILS,
transportation of, by railway companies, 619.
MAJORITY,
may control company unless restrained, 11.
cannot change organic law, 12.
except in the mode prescribed, 12.
cannot accept amended charter, 12.
or dissolve corporation, 12.
may obtain enlarged powers, 13.
may use common seal, and funds for that purpose, 13.
but not to convert canal into railway, 13.
right of minority lost by acquiescence, 13.
acquiescence of one plaintiff fatal, 14.
may bind company in alterations of charter not fundamental, 92–95.
may obtain enlarged powers with new funds, 420, 421.
may defend against proceedings, in legislature, 421, 422.
but cannot ratify acts, *ultra vires*, by legislative sanction, 422.
MANDAMUS,
directors of company.
to compel directors to fill vacancy, 22.
transfer of shares.
to compel company to register, 63.
registry of name of successor to title of shares, 64.
company to collect of subscribers, and pay creditors, 75, 77.
construction of railway.
does not lie, where company have an election, 197.
general rules governing, 440–445.
regarded as a supplementary remedy, 440.
mode of procedure, 440, 441.
in the American courts, 441, 442.
English statute, 443.
not amendable in English practice, 442, 443.
mode of trying truth of return, 443, 444.

MANDAMUS,—*continued.*
costs, 444.
mode of service, 444, 445.
effects specific performance, 445.
to enforce duty of corporation, 445, 446–452.
to compel company to complete road, 446–453.
when this the proper remedy, 453.
where act is imperative upon company to build road, 453, 454.
in such case injunction less appropriate, 454.
to enforce public duties of corporations, 455.
facts may be tried by jury, 455, 456.
cannot be substituted for *certiorari*, 456.
requiring commissioner to allow costs, 456.
to assess compensation for land, 456.
to enforce specific duty, and no other remedy, 456.
never issued to control the exercise of discretion, 457.
or to try the right to an office, 457.
proper excuses, or returns to the alternative writ, 457–459.
that powers of company had expired, at date of writ, 457, 458.
want of funds, 457.
but not that the road is unnecessary, or would not be remunerative, 458.
part of return may be quashed, 458, 459.
counsel for petitioner entitled to go forward, 459.
cannot impeach the statute, 459.
peremptory writ cannot issue, till whole case determined, 459.
return will not be quashed summarily, 459.
no excuse allowed for not complying with peremptory writ, 459.
alternative writ requires too much, is bad for all, 460.
enforcing payment of money awarded against railways, 460–462.
where debt lies, cannot have mandamus, 461.
lies to compel payment of compensation for land, 461.
not allowed in matters of equity jurisdiction, 461, 462.
contracts not under seal, enforced by, 462.
sometimes denied in matters of private concern, 462–465.
to compel company to divide profits, 462, 463.
production of corporation books, 463.
performance of statute obligation, 463.
but not to undo, what is done, 463.
to compel production of register of shares, 464.
or the registry of the owner's name, 464.
for restoring persons to corporate office, 464, 465.
lost by acquiescence. Proceedings must be bonâ fide, 466.
allowed where indictment lies, 467.
to compel company not to take up rails, 467.
will not lie, where there is other adequate remedy, 467.
judgment on, revisable in error, 468.
MARRIED WOMAN,
suits where the injured party is, 341.

MASTER AND SERVANT, (See AGENT, CONTRACTOR, and SERVANTS.)
when liable for injury, by fellow-servant, 386–390.
MATERIALS,
company liable for those taken by contractor, 120, 121.
right to take, without the limits of survey questioned, 121.
MEASUREMENT,
of wall, to be built by cubic yard, 230.
MECHANICS' LIEN, (See LIEN.)
MEETINGS,
special must be called according to charter, 16.
but if all attend, it is sufficient, 16.
special, must notify all important business, 16.
general, need not notify business, 16.
may be both general and special, 16.
adjourned, still the same, 16.
courts will presume they were held, at place required, 16.
requisite notice, 19, 20, and notes.
any number who attend, after legal notice to all, is a quorum, 20, 21.
MINERALS, (See EMINENT DOMAIN. EQUITY.)
MORTGAGE,
of franchise, 36, 572–591.
of shares, 63.
of things not *in esse*, 591.
MORTGAGEE, (See RAILWAY INVESTMENTS.)
of shares in railway.
liable for debts of company, as owner, 57, 58, 59.
notice requisite to perfect title, 65.
rights and remedies, 564–596.
MORTGAGOR,
of shares.
may proceed in equity to obtain retransfer, 57, n.
MUNICIPALITIES, (See TAXATION.)
right of to subscribe for stock, in railway, 533–536.
bonds issued by, 596.
power to make railway grants, 616–618.

N.

NAVIGABLE WATERS,
right to construct railway across.
legislature may grant right, 165, 167.
riparian proprietor owns only to water, 166.
his rights in the water subservient to public right, 166.
state legislative grant paramount, 167.
state interest in flats, where tide ebbs and flows, 167.
rights of adjoining owners, 167.
railway grant, to place of shipping, 168.
large rivers held navigable water here, 168, 169.

NAVIGABLE WATERS,—*continued.*
riparian owner may recover damage by being cut off from wharves, or the navigation, 169.
obstruction of, indictable, 520.
NEGLIGENCE,
in construction of road.
by diverting watercourses, 157.
or erecting their works, 174.
the proper remedy for negligence in construction, 179.
which exposes to inevitable accident, makes carrier liable, 234.
by carrier.
when carrier not liable for, if gross, 297–300.
by passenger carrier.
of those who carry party affects him, 332.
ordinarily a question for the jury, 333.
what is evidence of in regard to fires from company's engines, 357, 358.
how proved, 365, 398.
in regard to domestic animals, 361–368.
NEW SHARES,
when party entitled to claim, 56.
NEW TRIALS,
allowed for excessive damages, 346.
NOTICE, (See DIRECTORS.)
of claim against common carrier, 235.
effect of in limiting carrier's responsibility, 265, 272–274, 276–280.
assented to by consignor, amounts to special contract, 265, 266.
carrier must show, that consignor acquiesced in, 266.
decisions, in New York, 267, 268.
American cases generally, 268.
exceptions, 269.
will not excuse negligence, 269, 272, 276–280.
result of all the cases, 269.
written, will not affect one who cannot read, 270.
carrier must see, that notice is carried home to consignor, 270, 271.
former dealings, with same party, presumptive evidence, 271, 272.
as to ordinary or extraordinary responsibility, 280, 281.
of want of authority, in agents, 292, 293.
NUISANCE, (See INDICTMENT. EQUITY.)
infringement of corporate rights in nature of, 502, 503.
how far railways may become, 519, 520.

O.

ORGANIZATION,
when it takes effect, 8.
want of must be pleaded, 9.
cannot be raised collaterally, 9.
records of company evidence of, 9.

ORGANIZATION,—*continued.*
chancery jurisdiction in regard to, 9, n.
effect of colorable subscriptions, 9, n.
ORIGIN,
of railways in England, 1.
in America, 3.
of use of steam-power on railways, 3.
OVERISSUE OF SHARES, (See RAILWAY INVESTMENTS.)
effect of upon company and holder, 569–571.
OWNER,
of shares,
company may regard the register as evidence, 66, 67.
equity will protect the rights of equitable, 67.

P.

PACKAGE,
where not safe, 262.
disguise used, 299.
carrier not liable for loss, through defect of, 303.
PARENT AND CHILD,
father cannot sue for loss of service of child killed, 339.
(But see PASSENGER CARRIERS.)
nor can any recovery be had for death of an insane child, where the neglect of the father produced the result, 340.
PAROL EVIDENCE, (See CUSTOM.)
how far admissible to explain writing, 52, 53.
PARTIES,
to bill in equity to vacate sale of shares, procured by false representations of the directors, 60, 61.
in contesting railway securities, 573.
where securities fraudulently transferred to several parties, 570.
PASSENGER, (See BY-LAWS.)
may be excluded from cars, for disorderly behavior, 32.
arrest of by company's servants, 33.
PASSENGER CARRIERS,
right to expel passenger for misconduct, 33, n.
degree of care required, 323–329.
are not insurers, as to passengers, 327, 328.
liability, where both parties are in fault, 329–334.
company not liable, unless in fault, 329, 330.
not liable, where plaintiff's fault contributes to injury, 330.
are liable, for wilful misconduct, 330, 331.
and for gross neglect, 331.
being in baggage car, will not preclude recovery, 331, 332.
or out of place, in the train, 332.
party affected, by negligence of those who carry him, 332.
not excused if they might have avoided the injury, 333.

PASSENGER CARRIERS,—*continued.*
party, to recover, must be lawfully in place, where injured, 333.
passengers bound to conform to regulations of company, 333, 334.
injuries by leaping from the carriages, 334–336.
party may recover, when he had reasonable cause to leap from carriage, and was injured, 334, 335.
but not, where his own misconduct exposes him, 334–336.
injuries producing death, 336–341.
remedy exclusively statutory, 336.
if deceased in fault, no recovery, 337.
damages, 337–339.
no recovery where caused by neglect of fellow-servant, 340.
or defect of machinery, 341.
where the injured party is a married woman, 341.
liability where trains do not arrive in time, 342, 343.
may excuse themselves by special notice, 342.
liable for damages, by discontinuance of trains, 342.
but not for injury, on stage line, advertised in connection with railway, 343.
what will excuse refusal to carry, 344, 345.
rule of damages for injuries to passengers, 345–348.
cannot drive within the precincts of railway station, 348.
duty resulting from sale of through passenger tickets, 349, 350.
not the same as where goods, or baggage, are ticketed through, 349.
is a sale of tickets, for the separate roads, 349.
first company, agents of the others, 350.
where business of whole line is consolidated, 350.
not a case of partnership, 350.
declarations of party, 351.
competent to show state of health, 350.
not to show how injury occurred, 350.
passengers wrongfully expelled from cars, 351, 352.
company not liable for exemplary damages, 351.
if party sustain special damage, company liable, 352.
are liable as trespassers, for not delivering baggage, 352.
paying money into court, in actions against, 352, 353.
on general count, 352.
in count, on special contract, 353.
liability where one company uses the track of another, 353, 354.
not liable for torts committed by strangers, 354.
liable to passengers from other roads, 354.
duty of lessors and lessees of railways, to passengers, 424–431.
company bound to keep its own road safe, 424–428.
bound to fence road for protection of passengers, 372.
cases which hold that passengers can only sue road carrying them, 429, 430.
bound to make landing-places safe, 430.
this duty does not extend to passengers, on freight trains, 430.

PASSENGER CARRIERS,—*continued.*
all owners of property bound to keep it, so as not to injure others, 430.
same rule extends to railways, where parties rightfully upon them, 430, 431. (See APPENDIX C. 692–697.)
PAYING MONEY INTO COURT,
in actions against carriers of passengers, 352, 353.
PAYMENT,
in contracts for construction.
in depreciated orders, if accepted, binding, 208, 209.
in stock of company, 206, n. 1, 227–229.
time and mode of, 230.
no time specified, to be when work done, 230.
usage will control, 230.
PENALTY,
in contracts for construction.
regarded, as liquidated damages, 200, 201.
not incurred, unless upon strictest construction, 201.
cannot be set aside, in equity, unless for fraud, 216.
in railway mortgages will be relieved against, 591.
as where it is agreed principal shall fall due, upon neglect to pay interest, 591.
PIRACY,
if carrier lose goods by.
it is a loss by *vis major*, as by public enemy, 233.
PLANS AND SURVEYS,
only binding, in the construction of charter, when referred to, and for the purpose referred to, 189.
determine when company may take land, 191.
POLICE OF RAILWAYS, (See RAILWAY COMMISSIONERS.)
regulation of, by municipal authority.
may prohibit use of steam-power in streets, 615, 616.
without aid from legislature, 616.
during construction of railways, 616.
right of municipalities, to make railway grants, 616–618.
POWERS, (See EQUITY.)
application to legislature for enlargement of, 496, 497.
PRACTICE, (See PROCEDURE.)
in proceedings to estimate land damages.
right of appeal, 146.
notice, 146.
summons, 146.
finding upon separate items, 146.
where different mode of proceeding is prescribed, by general law, subsequent to charter, 146, 679.
PREFERRED STOCK, (See RAILWAY INVESTMENTS.)
right to issue, 593.
PRELIMINARY ASSOCIATIONS, (See PROMOTERS.)

PRELIMINARY SURVEYS,
may be made, without compensation, 119.
company not trespassers, 120.
PROCEDURE, (See PRACTICE.)
in estimating compensation for lands, 133–146, 679.
legislature may prescribe, 139.
notice required, 140.
exceptions of form waived, 140.
unless made in time, and placed upon record, 140.
proper parties, 140.
title may be inquired into, 141.
parties joining must have joint interest, 141.
jury may report facts specially, 141.
land must be described in verdict, 141.
special finding, upon distinct claims, 142.
different interests, 142.
where charter provides one mode, and subsequent general statute another, 146, 147, 679.
PROJECTORS, (See PROMOTERS.)
PROMOTERS,
mode of instituting railway projects in England, 631–633.
company bound by contracts of promoters, according to charter, 631, 632.
provisional directors issue scrip, 632.
if vendor of scrip, sell to another, is liable for price obtained, 632.
holders of scrip entitled to be registered as shareholders, 632, 633.
general acts of incorporation in some states, 633.
liable for the expenses incurred, 633–635.
contracts of promoters not binding upon company, 634, 635.
liability of subscribers *inter sese*, 635–638.
extent of liability measured by deed of association, 635, 636.
deed of association not binding, until terms complied with, 636.
power of directors limited by deed, 636.
liable for expense incurred by their consent, on their credit, 636, 637.
not liable as partners, 637.
contracts of, adopted by the company, 638.
how this may be done, 638, 639.
contracts with the opposers of a railway bill, 639–646.
what contracts of this kind enforced against company, 639–647.
how far courts of equity enforce such contracts, 647–659.
when railway is abandoned, 648–657.
practice of courts of equity, in decreeing specific performance of such contracts, 658–662.
courts of equity sometimes restrain the party, from petition, or opposition, in parliament, 662, 663.
contracts to withdraw opposition, and keep secret, illegal, 663–666.
not enforced, unless under peculiar circumstances, 663.
more properly secured, by provision inserted in charter, 664.
this the only mode of enforcing such contract here, 665.
English cases receding from former ground, 666.

PURCHASE, (See LICENSE.)
of land for railway, 104.
of persons incapacitated, 104.
price to take place of land, 105.
right against land-owners, and other railways, limited by charter, 105.
company bound to same duty, as where land is condemned, 105.
license to build railway, not limited by charter, 105.
company bound by conditions in deed to them, 106.
parol license good till revoked, 106.

Q.

QUO WARRANTO,
information in the nature of, 472, 473.
general incidents of this remedy, 472.
issued by highest courts of ordinary civil jurisdiction, 472.
in English practice this remedy limited to public corporations, 473.
in American courts extends to railways, banks, &c. 473.
will try the right, but not restore party rightfully entitled, 473.

R.

RAILWAYS,
private, in England, originally; questions in regard to, 1.
public grants in America, 3.
some exceptions in this country, 3.
private corporations, 5.
public, where stock is owned by state, 5.
in such case, under legislative control, 5.
public trust, 14.
company may be restrained from taking up rails, and required to maintain in condition fit for public use, 3.
right to cross, gives no right to take land, 125.
conflicting right to take lands, 125, 126, 164, 165.
common carriers, 234.
as such, liable for goods, and baggage, 235, 236.
RAILWAY COMMISSIONERS,
supervision of railway legislation, 610, 611.
supervision of railways.
opening railways in England, 611, 612.
establish connections between different lines, 612.
courts of equity will not interfere with decisions of, 612, 613.
English courts have concurrent jurisdiction sometimes, with Railway Commissioner, 613.
returns to be made to.
traffic and accidents, 613.
control of third class and mail trains, 613.
may extend time for completing road, 613.

RAILWAY CROSSINGS, (See TORTS.)
on a level always dangerous, 393.
company not excused by use of required signals, 393.
party cannot recover if his own act contribute to injury, 394.
but if precautions omitted, not liable, unless, &c. 394.
RAILWAY INVESTMENTS,
extent of, in Great Britain, 5 and n.
productiveness in Great Britain and France, 5.
power of the company to do acts affecting the value of their stock and bonds. Overissue of stock.
English statute requires subscriptions before incorporation, 564.
speculations to raise the price of stock, 564.
issuing shares, at different prices, fraudulent, 564–568.
mode of issuing bonds and mortgages objectionable, 564–568.
difficulty of legislative restrictions not invincible, 568.
something might be accomplished, 568.
losses fall severely upon small investments, 568, 569.
overissue of shares, 569.
case before Superior Court of New York, 569.
same before the Court of Appeals, 569, 570.
duty of purchasers to make reasonable inquiry, 570, 571.
right of canal company to mortgage tolls, 571.
rights and remedies of bondholders and mortgagees.
tolls only mortgaged under English statute, ejectment will not lie, 572.
if successive liens created will lie, 572, 573.
English statutes allow no covenant to refund the money borrowed, 573.
but where no restriction, company bound by covenant, 573.
right of receiver can only be contested, by leave of court, 573.
all standing in same right necessary parties, 573.
priority of right how determinable, 574.
lien created by charter, subject to contractor's lien, 574.
some cases hold franchise may be mortgaged, without consent of legislature, 574, 575.
power to buy and sell real estate, implies power to mortgage, 575.
receiving money estops company from denying validity of mortgage, 575.
company cannot convey franchise of corporate action, 575–577.
right to mortgage subsequent acquisitions, 577–591.
general power to execute mortgages, 577–591.
form of remedy, 577–591.
rolling stock and furniture, passes by mortgage, 590, 591.
this is an accessary, if not a fixture, 590, 591.
what defences allowed the company, as to borrowed capital.
if transaction illegal or *ultra vires*, no estoppel, 592.
may contract with reference to future statute, 592, 593.
cannot allege their own fraud in defence, 593.
right to issue preferred stock, &c.
company may issue preferred stock, as means of borrowing money, 593.
loan may be converted into capital, 593.

RAILWAY INVESTMENTS,—*continued.*
investing trust funds in railway securities.
general duty of trustees, as to investments, 594.
railway securities too uncertain, 594.
illustration of the subject, 594.
holder of railway bonds may enforce them, 595.
so too of the coupons for interest, 595.
and bonds issued by cities and towns, 596.
(See APPENDIX C. 692–697.)
READINESS TO PERFORM,
contracts for sale of shares.
vendor must be ready to convey, 50.
vendee, to pay price, 51
RECEIVER,
when to be appointed, 591, 609, n. 2.
RECORDS,
of company.
primâ facie evidence of organization, 9.
of the performance of conditions by the company, 79.
of directors' meetings.
evidence, 21, 407.
REGISTER,
of company.
evidence of membership, 68.
REMEDY,
by statute, for compensation for land.
exclusive of all others, 157, 173, 174.
company liable in trespass, for taking land, where they do not proceed under statute, 174.
and in case, if guilty of negligence, in the course of construction, &c. 174.
REPORT, (See COMMISSIONERS.)
RESERVATION,
in land granted to railways.
of minerals, 157, 158.
of right to build private railway across public railway, 687.
RESPONDEAT SUPERIOR, (See AGENTS.)
RETURNS, (See RAILWAY COMMISSIONERS.)
RIPARIAN OWNER, (See NAVIGABLE WATERS.)
owns only to water, 166.
may recover damage for obstruction by railway, 169.
RIVAL INTEREST,
not allowed to maintain suit, 15.
ROLLING STOCK,
accessary to the road, 590, 591.
as such, passes by the mortgage of the road as real estate, 590, 591.
such mortgage need not be recorded as a chattel mortgage, 590, 591.
may be levied upon by creditors, where held in excess, 591.

RULES,
of stock-exchange.
not binding upon parties to former sales, 50.

S.

SALE,
of shares.
of spurious shares *bonâ fide*, vendor liable to refund price, 49, 50.
no implied warranty, to entitle vendor to further damages, 50.
of road.
is no abandonment, so as to cause reverter, 106.
SEAL,
how far contracts of corporation must be made, 423.
SERVANTS, (See PASSENGER. AGENTS.)
company liable for the act of, 33.
may bind company in regard to parcels, 237, 238.
primarily liable, for use of defective machinery, 341.
injuries to, by neglect of fellow-servants and use of machinery, 386–390.
in general, company not liable, 386, 387.
unless improper servants, or machinery, are employed, 387.
not liable for deficiency of help, or not fencing road, 387.
distinction attempted between servants of different grades, 387, 388.
some states, and countries, take different view of law, 388–390.
case of slaves, 388.
ship-owners do not impliedly undertake, that ship is sea-worthy, 389, 390.
rule does not apply, where servant has no connection with work, 390.
SERVICE,
of writ of mandamus, 444, 445.
SHARES, (See STOCK.)
in railway.
personal estate, 39, 40.
agreement to allot, will not be decreed specifically, 55, 56.
held in trust. (See DIRECTORS.)
go to new trustees, in cases of death, insolvency, &c. 65.
forfeiture of shares, relief in equity, 102, 103.
obtained by fraud.
equity will accord to those entitled, 70, n.
SHAREHOLDERS,
general rights enumerated, 26.
original subscriber may transfer shares, 41–44.
liable to action for diverting funds of company, 76.
and to bill in equity, 76.
liability to creditors, 603, 608.
SIGNALS, (See RAILWAY CROSSING.)
SLAVES,
liability of company for injuries to, 388, 394, 395.

SPECIFICATION OF CLAIM,
party may recover beyond, where evidence justifying it, is received, without objection, 206, 207.
SPECIFIC PERFORMANCE, (See EQUITY.)
for sale of shares.
will be decreed, in regard to contract for sale of shares, 54, 55.
of contract to purchase lands by company.
will be decreed against the vendee, 54, 55.
will never be decreed where not in the power of party, 55, 56.
for sale of lands.
of contracts before, and after, date of charter, 107.
of contracts, where terms are left indefinite, 107.
where umpire is to fix price, 107, 108.
where mandamus also lies, 108.
but not unless signed by company, 108.
or where the terms are left uncertain, 108.
where the company had an election and make it, 108, 109.
but not where the parties understood the contract differently, 109.
order, in regard to construction of highways, 109, 110.
effected by mandamus, 445.
of contracts with the promoters of railway projects, 647–662.
SPURIOUS SHARES,
sale of.
vendor acting *bonâ fide*, only bound to refund money received, 49, 50.
no implied warranty of title, in such case, 50.
STATE,
patronage in maintaining railways, 5.
owning the stock in a corporation.
cannot divert the funds of company from creditors, 75, 76.
statute authorizing it invalid, 75, 76.
STATIONS,
persons having no business to transact there, may be excluded, 27, 28.
regulations may be made *informally*, in regard to the conduct of others, 28.
superintendent may expel for violation of rules, 28.
probable cause will justify, 28.
in civil suits, must prove violation of rules, 28, 29.
principles of the rule stated, in note, 29.
STATUTE,
where it imposes duty.
action will lie to enforce, 462.
STEAMBOATS,
railway company cannot purchase, 91, 92.
STOCK, (See CAPITAL STOCK. RAILWAY INVESTMENTS.)
in railways, and similar companies, formerly treated as real estate, 39, 40.
STOCKHOLDERS, (See SHAREHOLDERS.)
STOCKJOBBING,
strictly applies to speculations in public stocks, 46.

STOCKJOBBING,—*continued.*
buying and selling railway shares, where difference only is expected to be paid, 46.
STOPPAGE IN TRANSITU,
general requisites, to right, defined, 303–307.
carrier liable, if he do not surrender goods, 304.
may detain, to ascertain the right, 304.
right exists, as long as goods remain, under control of carrier, 304, 305.
uncertainty, in regard to intermediate consignees, 305.
right determines, when goods reach consignee's agent, 305, 306.
carrier compellable to solve question at his peril, 306.
conflicting rights may be determined, by action, 306, 307.
or carrier may deliver to rightful claimant, 307.
STREAMS,
obstruction of by company's works.
company cannot divert, without compensation, 170.
liable for imperfect works, connected with, 170.
or if they adopt works, built by others, 179, 180.
STREETS,
right to use in constructing railway, 126, 127.
use of railway in, not nuisance, 519.
grant from municipalities, 519, 520, 616–618.
use of steam-power in, may be prohibited, 615, 616.
owner of fee entitled to compensation, 160. (See HIGHWAYS.)
SUBCONTRACTORS, (See EMPLOYEES.)
SUBSCRIBERS,
for stock in company not carried into operation.
may be made liable for expense incurred, 77.
responsible, when to be regarded, 80.
SUBSCRIPTION,
for stock:
where company not formed according to general laws, 7.
when binding, how released, 70, n.
to definite stock, promise to pay implied, 71–74, and notes.
aliter of stock indefinite, ib.
must be in conformity with charter, 82.
but company may waive condition, in their favor, 37, 38.
colorable, valid, 69.
directors compellable to register, 69, 70.
cannot be varied, by oral evidence, 70.
to indefinite stock does not bind party to pay assessments, 70, 71.
aliter, if it be a definite stock, 71–73.
what amounts to, 81, 82.
upon condition, before, and after performed, 80, 88.
payable otherwise than in money, not binding, 89, 99.
before date of charter, 97.
at reduced prices, not binding, 99, 100.
contracts to release not valid, 99, 100.
obtained by fraud, relief in equity, 100–102.

SURVEYS,
may enter upon land for making, without compensation, 119.
company not trespassers, 120.
location of, must be shown by company, 121.

T.

TAX,
illegal,
directors may be compelled to resist, 495.
TAXATION,
is an unrestrained power, 111, n.
assessments upon works, and upon shares.
net profits in each parish, 523.
increased by traffic, diminished by repairs, 524.
depreciation of road by use, 524.
mode of estimating yearly profits, 524, 525.
rule in several states, 525–527.
exemptions from, by legislative act, 526, 527.
liability to taxation upon shares, same as for other personal property, 527, 528.
not liable to, under general laws, 528.
necessary erections, not taxable, separate from road, 528.
those which are for convenience and profit are, 529.
legislative exemption from.
general nature of such exemption, 529.
includes stock, 530.
qualifications of the rule, 530, 531.
exemption of stock, includes property of company, 531.
with exceptions, 531.
consolidation of companies, where some exempt and others not, 531.
construction of qualified exemption, 531.
general exemptions held invalid, 531, 532.
company cannot be taxed both directly and indirectly, 532.
qualified exemption valid, and inviolable, 532, 533.
such exemptions held temporary, in some cases, 533.
right of towns, cities, and counties, to subscribe for railway stock.
such subscriptions valid, if authorized by legislature, 533, 534.
subscriptions to such works, in other states, &c. 535.
lateral railway acts in Pennsylvania, 535.
dissent from the legality of such subscription, 535, 536.
strict construction of these acts, 536.
cases reviewed, 533–535.
legislature may legalize former subscription by city, 535.
TELEGRAPH COMPANIES,
in their construction.
right to pass directly across, does not include boring under railway, 197.
definition of terms, across and under, 198.

TENANT, (See ESTATES.)
entitled to compensation for interest in land, 180–182.
TICKETS.
(See BY-LAWS, INDICTMENT, COMMON CARRIERS, PASSENGER CARRIERS.)
for different roads, with coupons attached, 349, 350.
TIME,
mode of reckoning, 627.
TITLE,
of land.
when vests in company, 118, 119.
company have only right of way, 124, 126, 127.
can take nothing away, but for construction, 124.
effect of deed in fee, 124, 125.
further assurance may be sought, 128.
cannot be impeached, 129.
cannot be inquired into under English statute, 683, 684.
in the American states, 684.
TOLLS,
excessive tolls, fare, and freight, 355, 356.
where taken may be recovered back, 355.
right to use road, on payment of, 356.
fare and freight, limited, 356.
guaranty of definite profit is lawful, 356.
restriction of freight, extends to whole line, 356.
lessees not bound to carry for same freight, which they pay as toll, 356.
mode of declaring for, 356.
requisite proof, and mode of establishing, 356.
TORTS, (See WRONGDOER.)
company, as carriers of passengers, not liable for, if committed by strangers, 354.
liability of company for, 393–396.
railway crossing upon level, 393.
company not excused, by use of required signals, 393, 394.
party in fault cannot recover, 394.
unless the company might have avoided the injury, 394.
not liable, for omitting signals, unless that produce injury, 394.
not liable for damage to cattle trespassing, 394–396.
or to slaves asleep upon track, 394, 395.
general duty of company, towards those exercising legal rights, 395, 396.
action accrues from injury, 396.
when injury wanton, jury may give exemplary damages, 396.
TOWNS, (See MUNICIPALITIES.)
TRAFFIC, (See ARRANGEMENTS.)
contracts between different companies regulating, 436.
what renders contract perpetual, 436.
includes transportation of goods and passengers, by English statutes, 614.
TRAINS, (See PASSENGER CARRIERS. EXPERTS.)
liability where they do not arrive in time, 342, 343.